SUPREME COURT, U. S.

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MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-396

BUDDY HERMAN MATHIS,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Supreme Court of the State of Alabama and the Alabama Court of Criminal Appeals

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INTRODUCTORY STATEMENT

The Petitioner, Buddy Herman Mathis, respectfully petitions for a Writ of Certiorari to review judgments of the Supreme Court of Alabama and the Alabama Court of Criminal Appeals unofficially reported as **Mathis v. State,** — So2d —, handed down by the Alabama Court of Criminal Appeals on August 14, 1973, and **Mathis v. State,** — So2d —, handed down by the Alabama Court of Criminal Appeals on August 28, 1973,

affirming judgments against Petitioner made and entered by the Mobile Circuit Court, Mobile County, Alabama, on December 18, 1970, and June 25, 1971. The cases were consolidated before the Supreme Court of Alabama as they contain similar questions of law and fact, and this Petitioner seeks review of both judgments.

The opinion and dissent of the Alabama Supreme Court, Heflin C.J. not sitting, quashing preliminary Writs of Certiorari is appended, bound with this Petition, and marked Appendix A. It is cited unofficially as 8 ABR (Alabama Bar Reports) 1147.

The opinions of the Alabama Court of Criminal Appeals are appended, bound with this Petition, and marked Appendix B. 1 Div. 139 in that Court became S.C. 556, and 1 Div. 217 in that Court became S.C. 555.

The decision of the Alabama Supreme Court was handed down on May 9, 1974. The judgment is appended, bound with this Petition, and marked Appendix C.

Petition for Rehearing was denied by the Alabama Supreme Court on July 11, 1974, and the Clerk's certificate of the judgment denying rehearing is appended, bound with this Petition, and marked Appendix D.

Petitioner was permitted to remain at large on bond for a period of ninety days from July 12, 1974, to allow filing of this Petition, and a certificate of the Clerk of the Alabama Court of Criminal Appeals to that effect is appended, bound with this Petition, and marked Appendix E.

The dissenting opinion by Jones, J., of the Alabama Supreme Court (pp. 8-23 of Appendix A) effectively demonstrates in these cases that the State and Appellate Courts of Alabama refused to apply this Court's decisions in the area of prejudicial pre-trial publicity without legal basis for such refusal. We argue

that these cases are noteworthy to correct above all the injustice created by the refusal of the State Courts to apply Federal decisions and urge that by promulgating the further standards set forth in this Petition the Court will hereafter reduce the number of applications for relief in this area of constitutional law.

JURISDICTIONAL STATEMENT

The judgments sought to be reviewed are as follows:

(1) Judgments of the Alabama Court of Criminal Appeals affirming the trial court in the two cases, on August 14, and August 28, 1973, respectively.

(2) Judgment of Alabama Supreme Court quashing preliminary writs of certiorari, dated May 9, 1974.

The Order by Alabama Supreme Court denying application for rehearing was dated July 11, 1974, without opinion.

The Order by the Alabama Court of Criminal Appeals denying applications for rehearing in both cases were dated September 25, 1973, without opinion.

Petitioner believes that this Court has jurisdiction to review said judgments by Writ of Certiorari by virtue of 28 USC 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Trial Judge abused his discretion and erred in refusing to grant Motions for Change of Venue or Continuance or Order to protect the judicial process, and thereby violated Petitioner's rights under the Sixth Amendment to a trial by an impartial jury and under the Fourteenth Amendment to

due process of law, where: Petitioner was charged with defrauding the local public school system of large sums of money, the media first exposed the alleged wrongdoings, and thereafter provided special and widespread coverage, including over 800 news articles, plus radio and TV, highly derogatory to Petitioner, and including detailed reporting of testimony in lengthy trials of an alleged co-conspirator and of another school official, over 300 pages of voir dire examination of prospective jurors in each of two trials of Petitioner disclosed that almost all of the venire had been exposed to the publicity, the appellate court acknowledged that some of the jurors gave "equivocal answers" on voir dire, and the record shows that some jurors qualified by the Trial Judge over objection had testified to having preconceived opinions concerning the case.

(2) Whether a presumption for the protection of an accused is raised, that sufficient prejudice against him exists to warrant the granting of a Motion for Change of Venue, Continuance or Order to protect the judicial process, where the alleged crime, by reason of its violent nature or other impact upon the public, is calculated to arouse strong feelings in the community, is given massive, extensive or highly pervasive publicity, directed significantly toward the accused, however objective or essentially accurate or inaccurate such publicity may be, and where the venire from which the jury is to be drawn is shown to have been significantly exposed to the publicity, and the alleged crime and persons principally involved therein are essentially local in nature so that other neighboring areas are not likely to be so affected; so that it becomes incumbent on the trial court thereafter to determine that sufficient facts exist to overcome such presumption before proceeding to trial.

(3) Whether this Court should hold it to be a responsibility of lower appellate tribunals, where accused persons allege that their Sixth Amendment rights to a trial by an impartial jury and Fourteenth Amendment rights to due process of law have been

violated through denial of a change of venue, continuance or appropriate order to protect the judicial process, to set out in their opinions or judgments the principal facts asserted by the accused as showing prejudice or the absence of the necessary impartiality, and which such lower appellate tribunal has not found sufficient to warrant the relief requested; and whether this Court should indicate that it will look more favorably upon the granting of writs of certiorari in order to permit a review on the merits in those instances where the lower appellate tribunals have failed to so treat the facts relied upon by the accused.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section 1 of the Fourteenth Amendment provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

any State deprive any person of life, liberty or pro
without due process of law; nor deny to any person wi
its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASES

The indictments arose out of what later became an award-winning series of newspaper articles calling for an investigation of the Mobile County School Board, which exposed the alleged misappropriation of school funds. The articles commenced in December of 1969 and on April 10, 1970 (R. 1). Petitioner and five others were indicted. Petitioner's trial was set for December.

The facts of the first case (S.C. 556) arose out of Hurricane Camille striking Mobile County on August 17, 1969. The Board of School Commissioners awarded a cost plus contract for school repairs to Petitioner without bidding by the public on the ground of an existing emergency. The State's evidence indicated that false inflated invoices were submitted by sub-contractors and were paid by the Board. Mathis and an alleged accomplice, Pennell, who was an employee of the School Board, were charged with fraud. Contractors and materialmen inflated their bills and allegedly made kickbacks to Pennell, who testified as a State witness that Mathis participated in the scheme. Mathis defended on lack of criminal intent and that the sum charged was fair in the emergency circumstances.

An example of the tone of hate against Mathis established in the community was the verbatim printing on the front page of the daily newspaper of the very unusual "report" submitted by the Grand Jury when it returned the indictments on April 10, 1970. It was printed next to bold news articles naming Mathis as the contractor, and included the following:

". . . nearly a quarter of a million dollars in public school funds, in our opinion, was fraudulently obtained by *one*

contractor in 1969 in connection with but two school board jobs. (Emphasis added).

". . . Any pride we might have felt over our work, however, has been overcome by the shock and shame we have experienced upon learning of some of the activities of some of those responsible for seeing that the children of Mobile receive the quality education that the taxpayers' money is intended to provide . . ."

Eight indictments were returned against Pennell and Mathis, all pertaining to school contracts. Pennell was tried under the "Hurricane Camille" indictment in June, 1970. Another school official was tried in connection with the "summer renovations" in September. Both defended primarily by blaming Mathis, who, of course, was not in court to cross-examine. In each case the testimony of witnesses was printed in the newspaper in verbatim style. In October, 1970, following his June conviction, Pennell pleaded guilty to the remaining seven indictments, all with more sensational headlines. Among the front page captions were, "Jury Hears Mathis Job Repair Gyp", "$32,000.00 in Bogus Billing Explained at Pennell Trial", "School Repair Claims Called False" and "Banker Tells of Payment by Mathis."

Motions for change of venue and/or continuance, together with a motion to protect judicial process, were timely made. Over eight hundred (800) newspaper articles documented said motions, and witnesses were presented to the Lower Court from every section of the City supporting the fact that Mathis could not receive a fair trial. Testimony from radio and television announcers and executives were presented to the Court as to news broadcasts denouncing Petitioner in a most defamatory manner. Fourteen (14) radio and three (3) network TV stations competed for public attention with their own versions of sensational coverage. Examples of these were made part of the record. Detailed statistics on population, media number, range

and circulation, school population, and jury venire were stipulated into the record. The State offered no rebuttal witnesses. The trial judge, overwhelmed by the evidence, prejudicially revealed his bias as in one instance he requested a defense counsel to testify against his client to the effect that Mathis could get fair treatment in Mobile County. When challenged on this, the trial judge described himself as being "mortified", but nevertheless denied all defense motions summarily. Petitioner was tried under the identical indictment as Pennell, was found guilty and sentenced to eight years in the State Penitentiary, in December, 1970.

In the second case, Supreme Court No. 555, the Petitioner Contractor once again had entered into a contract with the Mobile County School Board for renovation and repairs of certain school kitchens prior to school opening during the summer of 1969. Time was of the essence, and the contract was awarded without competitive bids under the emergency provision of the Competitive Bid Law. Mathis advised two materialmen to submit bids to him as general contractor for the kitchen equipment and to add a percentage to the bids for his overhead and profit. The materialmen testified that this was not unusual at all. The bids were opened in Petitioner's office. The higher figure, containing Contractor's overhead and profit, was tendered to the School Board and they paid the fixture supply house, who in turn paid Petitioner a rebate of over $10,000.00. The fixtures were installed by Petitioner. Again, the quality of work was excellent and the repairs were timely made, to the satisfaction of all. Once again, Pennell, the alleged accomplice, testified as a State witness against Petitioner that he expected to receive some gain from Petitioner in the future, but that Petitioner had never in fact paid him anything for his assistance in having the Board approve payment for the materials furnished. Prior to this second trial all the media had given headline coverage to the lengthy, two-week trial of his first case, including further verbatim reporting of testimony. One month prior

to the second case being heard, in May of 1971, Petitioner, in a civil jury trial before the same Lower Court Judge, was found guilty of fraud on some of the same fact issues involved in the indictments, and was assessed some $66,000.00 in a verdict for the Plaintiff, Mobile County School Board. Once again more resultant prejudicial pre-trial, headline publicity descended upon Petitioner merely thirty (30) days prior to his second criminal trial in June, 1971.

The news media continued to saturate the community of Mobile County in an uninterrupted fashion with Petitioner's name foremost in the public's eye during the entire period in question.

The hundreds of pages of voir dire in both cases removes any doubt as to the volume, intensity and quality of the prejudicial publicity documented in the record as the veniremen testified time and time again to the effect that the news media had upon them. The voir dire in June, 1971, reveals that the passage of time had not lessened the impact one iota. The jury was informed prior to trial by the newspapers that they were to sit in judgment on Petitioner, and with the exception of one panel, the trial judge refused to instruct prospective jurors not to read the newspapers nor listen to broadcasts. Voir dire revealed that proposed jurors continued to be engulfed with publicity throughout the days of jury selection. One juror, Boswell, informed his panel for some twenty (20) minutes that the Petitioner was guilty as charged. See voir dire of C. T. Boswell (R. 128—Cause No. 217).

Jurors were accepted who had opinions of Petitioner's guilt if they would promise the judge they would try to be fair and do their best. The Court of Criminal Appeals, in its opinion, referred to this as jurors conscientiously laying aside their predilections. Jurors were accepted who informed defense counsel they would require evidence by the accused to prove his in-

nocence. The attitude of prospective jurors was established on voir dire when it was revealed "that practically all jurors in the room agreed with Boswell." (R.133, Cause No. 217).

Alma J. Middleton had a little opinion—"I would say it was not good." (R.174, Cause No. 217), and with this opinion he was allowed to sit.

Wiley Wynn thought Petitioner had "frauded the school board"—"It was a funny deal", and with this opinion, and with a sixty per cent (60%) physical disability, was allowed to sit (R.184, Cause No. 217).

Juror after juror responded in the manner shown above. The impact of the voir dire of Luther James, Jr., quoted in the dissent of Jones, J. (see Appendix A), indicates to any reader the end result of the publicity complained of. In one case only three (3) out of seventy-five (75) jurors had not been exposed to the prejudicial pre-trial publicity, and the figures were about the same in the other case. In both cases, jurors were accepted who had opinions about the guilt of the Petitioner, had relatives who taught in the Mobile County public school system, had openly discussed the facts of the case with third parties or had read verbatim prejudicial testimony concerning the Petitioner from earlier trials, in two of which he was not in court to cross-examine.

Nevertheless, the Court of Criminal Appeals (see Appendix B, page 5 in Cause No. 139) found that "this publicity was in nowise to the prejudice of Mr. Mathis." The same court did, however, acknowledge (see Appendix B, page 3 in Cause No. 217) that, "Some jurors when asked if they had fixed opinions, gave equivocal answers."

Beyond question, the constitutional issues presented by this petition were specifically presented in a timely manner in pre-trial motions, before and after the selection of the jury, then

again to the Alabama Court of Criminal Appeals on appeal and on application for rehearing, and to the Alabama Supreme Court on petition for certiorari and again on application for rehearing. The former ruled specifically on the constitutional issues, and the latter specifically declined to overturn those rulings.

REASONS FOR GRANTING THE WRIT

These cases provide the Court with an opportunity to amplify its earlier decisions on the subject of prejudicial pre-trial publicity in a manner which should work to reduce injustice at the trial and lower appellate levels, and hence the number of applications here for relief. They present no isolated problem. The record here shows unmistakably that the Alabama appellate courts, while giving lip service to the decisions of this Court, have emasculated their effect through the disarming device of "finding" or "concluding" that the Petitioner was "in nowise prejudiced", and that jurors "could set aside their predilections."

If, as Mr. Justice Frankfurter lamented, in *Irvin v. Dowd*, 366 US 717, 6 L. Ed. 2d 751, 81 S. Ct. 1639 (1961) (at 366 US 729, 6 L. Ed. 2d 760), "Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts . . ."; and if, as noted by Mr. Justice Clark in *Sheppard v. Maxwell*, 384 US 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (at 384 US 362, 16 L. Ed. 2d 620), "From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent" —and if, as in the cases at bar, State courts continue finding it convenient to put defendants to trial before prejudiced juries in the very face of those two powerful decisions, something more is needed. We urge in our argument some solutions.

In addition to *Irvin v. Dowd*, supra, and *Sheppard v. Maxwell*, supra, the Alabama Supreme Court and Alabama Court of Criminal Appeals decisions are also in direct conflict with the decisions of this Court in *Estes v. Texas*, 381 US 582, 14 L. Ed. 2d 543, 85 S. Ct. 1628 (1965); and *Rideau v. Louisiana*, 373 US 723, 10 L. Ed. 2d 663, 83 S. Ct. 1417 (1963); and with the decision of the Court of Appeals for the Third Circuit in *United States of America, Ex Rel. Edward Doggett v. Howard D. Yeager, Warden*, 472 F. 2d 229 (1973).

ARGUMENT

This Court, various special study committees, and the bar generally are all searching for better means of coping with the case load confronting the Court. The role of the news media in the Watergate matter is a reminder (perhaps unnecessary) of the eternal necessity for a vigorous and free press; but as all forms of communication continue to expand with increased effectiveness the protection of the constitutional rights of the accused becomes ever more, rather than less, a problem. We do not address ourselves in this brief to the problem of an accused who is a national figure, or where the publicity has permeated the entire country or even a significant part. We do, however, have a situation which is bound to be repeated a number of times each year in one part or another of the United States—a crime which, because of the particular circumstances (which may vary greatly), arouses strong emotions within a limited area, such as a county or other local political subdivision, and within the radius of circulation of the local newspaper, radio and TV stations; and which is intensively publicized; particularly where the news media uncovered and featured the situation. As happens in some percentage of these situations, we also have here a record which has meticulously preserved the unfolding, pre-trial publicity, which has all of the necessary pleadings and which also includes through the voir dire the impact upon the jury.

While all these factors don't coincide frequently, in this vast republic of ours such history repeats itself far too often.

The trial judge, with all his errors, nevertheless "let it all hang out" (to borrow from the vernacular) permitting a full record. The Alabama Court of Criminal Appeals not only had the obligation to examine the entire record, including all the news articles, photos, headlines in red print, etc., but claimed in its opinions that it had done so. The Court may rest assured that in Petitioner's briefs the more significant examples of prejudice in all this were singled out and cited by Petitioner at each appellate stage. With all this, then, and in view of *Irvin* and *Sheppard*, supra, and the other decisions cited above, how did these two cases get this far without being reversed? We argue that the reason in substantial part is that many appellate courts are just as determined as many trial judges to cling to old, outmoded tenets. If true red looks green to the eyes of one who is color blind, his friends will only know whereof he speaks when they see the true color itself. To the trial judge in this case, and to the judges of the Alabama Court of Criminal Appeals, an examination of the record in these cases makes it totally apparent that if a juror swears that he will try the case solely on the evidence and the instructions of the court, then, *ipso facto*, there is no prejudice to the defendant. Working backward from this premise, to such minds and eyes, none of the pre-trial publicity is prejudicial. But had the Alabama Court of Criminal Appeals, like the color blind person, been obliged to expose to public scrutiny in its opinion the specific examples of prejudice cited and relied upon by Petitioner, all the world could plainly see that it was using the wrong standards to determine prejudice, and that what it saw as "green" was actually "red" under the law of the decisions already handed down by this Court. The brief examples noted in our "Statement of the Case" and the voir dire of the juror, Luther James, quoted in the dissent of Justice Jones, are substantiated over and over again in the complete record. We strongly argue that where the factual basis

is offered by an accused upon which he seriously contends that his constitutional rights to a trial by an impartial jury have been violated, the appellate tribunal should have an affirmative duty to openly treat with and discuss such facts in its opinion, so that the factual basis for its decision is made a matter of record; and that failure of appellate courts to do so should be recognized as an invitation to review by this Court. Too often, as in the cases at bar, the true facts are buried in "legal conclusions", and with them, the constitutional rights of the accused. We earnestly suggest that such a rule would definitely reduce the number of and necessity for petitions to this Court for relief upon the grounds of prejudicial pre-trial publicity, because the lower appellate courts would have to reveal in the open book their treatment of the alleged prejudice.

Initially, it is well established that the granting of a change of venue or continuance because of prejudicial pretrial publicity is within the sound discretion of the trial judge, and that it is only the abuse of that discretion which is the subject of relief in the appellate process. We do not suggest that this principle be changed, but, again, because of all the tendencies resulting from the "communications explosion" and the problems presented to the courts, we urge that the trial judge should be aided in exercising his discretion by a presumption in favor of the accused in certain situations. The same presumption would be of great assistance to appellate courts on review, and would, again, tend to lessen the number of and need for appellate review. While "the Constitution lays down no particular tests and procedures not chained to any ancient and artificial formula," and while "Impartiality is not a technical conception" but "is a state of mind," we argue that a sufficient pattern has developed to enable this Court to fix the outlines of an objective standard, which we have set out as Item (3) under the "Questions Presented for Review." In the cases at bar, all of the warning signals were flying at the yardarm when the trial judge was making up his mind, yet in the "exercise of his discretion"

he chose to ignore all of the objective signals and to accept the judgment of the juror, a layman, that he could, would or would try, at least, to be impartial. Why he did this is not too important. We happen to be convinced that he did this because the appellate courts of Alabama for more than 100 years had accepted the opinion or decision of the juror himself as final. Important is the fact that in the light of the decisions of this Court the trial judge was palpably wrong. In cases as clear on the facts as the ones at bar, in balancing the rights of free press and fair trial, he should have told himself that there was sufficient evidence to raise a presumption in favor of change of venue, continuance or appropriate orders to protect the judicial process, and he should then have found it incumbent upon the prosecution to overcome that presumption by showing to the satisfaction of the court that all of the publicity had not permeated and infected the venire in such a manner as to deny to the accused an impartial jury.

The Standards of Criminal Justice, enunciated by the American Bar Association and quoted by the Alabama Court of Criminal Appeals at page 3 of its decision in Cause No. 139 (see Appendix B), are entirely subjective in nature and provide no guidance to the trial judge in determining the meaning of "prejudicial material." The Court of Criminal Appeals obviously equated "essentially truthful," "more or less objective," and "factual" with the absence of prejudice. The presumption we are urging would thus materially assist that and other appellate courts in determining such issues.

The Alabama Supreme Court, taking the position that the Court of Criminal Appeals was a court of last resort, declined to review its findings, although Justice Bloodworth in his opinion admitted that the key finding (that the publicity in nowise was to the prejudice of the defendant) was a legal conclusion or at least a mixed question of law and fact. On the basis of this bald conclusion he was "unwilling to presume that the de-

fendant was prejudiced." (See Appendix A, pp. A-3-A-4). We argue that, taking only the principal facts urged by Petitioner to the trial and lower appellate courts, as supported by the record, a presumption *was* raised that the defendant was prejudiced, and the courts became obliged to determine that such a presumption was overcome before putting Petitioner to trial.

The determination as to whether or not a jury panel or a juror has been tainted by prejudicial pre-trial publicity is one of mixed law and fact. This was determined by this Court in *Reynolds v. United States*, 98 US 145, 156, 25 L.Ed. 244 (1878). The rule in *Reynolds* was quoted and relied upon in *Margoles v. United States*, 407 F.2d 727, 730 (CA 7, 1969). Assuming that this Court determines that the only question here is the application of established principles to the facts disclosed by the record, then as Chief Justice Hughes wrote for this Court in *Norris v. Alabama*, 294 US 587, 79 L.Ed. 1075 (1934):

> "That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied. When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of the evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of the state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured." (294 US at pp. 589-590)

We are confident that a review of the record will bring this Court to the same conclusion as that reached by Justice Jones

(and concurred in by Justice Faulkner) of the Alabama Supreme Court in his dissenting opinion. There are many impelling similarities in the records in the *Sheppard* case and the cases at bar; and the same is true with regard to the *Irvin* case. The decision of the Third Circuit in *Doggett* beautifully traces the law. There are many striking parallels in the tactual sequence in *Doggett*, with the cases at bar. At page 239 of that decision the Third Circuit comes very close to recognizing a presumption for the protection of the accused as follows:

> "Thus, as of 1965 the rule was firmly established (1) that if a defendant has shown the likelihood that seriously prejudicial materials may have reached the jury, due process *requires* some form of relief, and (2) that a juror's statement that the adverse publicity will not influence him is *not sufficient* automatically to qualify him as impartial." (Emphasis added).

This Court, of course, has ruled that the due process clause of the Fourteenth Amendment incorporates the guarantee of the right to trial by an impartial jury of the Sixth Amendment, and thus it is applicable to state criminal trials. *Duncan v. Louisiana*, 391 US 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968).

Despite the initial burden upon a defendant to establish grounds for change of venue or continuance, we cite the decision of the Ninth Circuit in *Silverthorne v. United States*, 400 F. 2d 627 (1968), as recognizing that the accused must be aided, and that there is a burden upon the trial court to this end to insure that the balance is never weighed against the accused:

> "Juries are *not presumed* to separate truth from falsity in newspaper articles concerning trial in which they sit as judgment of fact and jury's impartiality must be kept free from outside influence whether private talk or public print." (Page 630) (Emphasis supplied.)

The issue throughout has been where and when the Petitioner should have been tried, not his guilt or innocence. Surely, in balance, a greater readiness on the part of the judiciary of Alabama and her sister states to move the site of a trial is a small price to pay for unrestricted, or virtually unrestricted, freedom of the press.

CONCLUSION

Petitioner respectfully submits that a review of the records would indicate that this Petition for Writ of Certiorari should be granted, and that the judgments of the Supreme Court of Alabama and the Alabama Court of Criminal Appeals which affirmed the judgments of the Circuit Court of Mobile County, Alabama, should be set aside, and the judgments of conviction reversed. In the unhappy event that direct review by certiorari is denied, we plead that the Court, as it did in *Irvin*, supra, will do so "without prejudice to filing for federal habeas corpus after exhausting state remedies." (353 US 98, 1 L. Ed. 2d 857, 77 S. Ct. 827).

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APPENDIX A

Bloodworth, Justice. (Concurring specially)

I concur in the Per Curiam opinion of the majority, but I wish to add the following observations. The dissent would reverse petitioner's conviction on the ground that the trial court committed reversible error in refusing to grant the motion for change of venue because of pre-trial publicity, despite the admission that *"the reporting was more or less objective* in light of the testimony developed at trial," and in the face of an express finding by the Court of Criminal Appeals that *the "publicity in nowise was to the prejudice of [defendant]."* [Emphasis supplied.]

To reach this result, in my judgment, would represent a departure from well-established and well-founded principles regarding right to fair trial.

As I understand it, the dissenting opinion purports to adopt, as Alabama law, the rationale of a federal circuit court in *Doggett v. Yeager*, 472 F.2d 229 (3rd Cir. 1973), and § 3.2 (c) of the ABA Project on Minimal Standards for Criminal Justice and would hold that a defendant is denied a fair trial anytime there is extensive pre-trial publicity, irrespective of its objective and factual nature. Apparently, prejudice is conclusively presumed from the fact of the mere presence of extensive pre-trial publicity of any character.

The essence of the right to fair trial is the right to an *impartial jury*. Alabama Constitution 1901, Art. I, § 6. See also *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 291 (1968). Clearly, a juror does not necessarily lose his impartiality merely by residing in an area in which there has been extensive pre-trial publicity regardless of its character.

Heretofore, it has been held sufficient if the juror can lay aside any impression or opinion he might have had and render a fair verdict based on the evidence presented in court. *Irwin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961). It is my judgment that such rule is required in our modern society in which mass media is so pervasive. Criminal prosecutions, especially those involving crimes of a spectacular nature, will naturally be considered newsworthy by the media and will inevitably generate a certain amount of publicity.

If a change of venue or a continuance is to be mandated in every instance where there is extensive pre-trial publicity being disseminated, it will become necessary to grant a change of venue or continuance in virtually *all* criminal prosecutions of any notoriety. Such a rule will virtually eviscerate the right to "a speedy public trial by an impartial jury of the county or district in which the offense was committed . . ." guaranteed by both the Federal and Alabama constitutions. See Alabama Constitution of 1901, Art. I, §26.

The Federal Constitution requires a change of venue only "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial . . ." *Sheppard v. Maxwell*, 384 U.S. 333, 362-63, 82 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

While there may be disagreement as to what constitutes proof of a "reasonable likelihood" that a fair trial cannot be had, I believe the accepted test is that expressed by our own Fifth Circuit Court of Appeals in *Hale v. United States*, 435 F.2d 737 (5th Cir., 1970). In *Hale*, the Fifth Circuit held that no reversible error arose because of a trial court's refusal to grant a continuance or to declare a mistrial on the grounds of pretrial publicity in the absence of demonstrable jury prejudice or highly pervasive, prejudicial publicity. This standard is equally

applicable to a trial court's refusal to grant a motion for change of venue.

I do not consider that the standard applied in *Doggett* or that recommended by the ABA Project differs materially from the *Hale* test. The ABA Project provides for change of venue "whenever it is determined that *because of* the dissemination of *potentially prejudicial material*, there is a reasonable likelihood that in the absence of such relief, *a fair trial cannot be had*." (Emphasis supplied.) *Doggett* also requires that the material disseminated be *prejudicial*. See 472 F.2d 229 at 238. *Doggett* merely holds that if the defendant proves widespread dissemination of *prejudicial* material, he need not prove actual prejudice or even that the prejudicial material in fact reached the jury.

In the instant case, the Court of Criminal Appeals found that the "publicity in nowise was to the prejudice of [defendant]." While this may be a "legal conclusion" as maintained by the dissent (or at least a mixed question of law and fact), this "conclusion" was based upon findings of fact by the Court of Criminal Appeals that the reporting was "factual," "truthful," "objective," and "reasonably free from any calls for action based upon emotional subjective judgments."

As we have stated many times, the Court of Criminal Appeals is a court of final appellate jurisdiction and for the Supreme Court to evaluate its findings and conclusions based upon the evidence (as opposed to its statements of law) "* * * would run counter to the oft-stated rule to the effect that this court [Supreme Court] on certiorari to review an opinion and judgment of an intermediate appellate court does not review the evidence as contained in the record to determine for ourselves what were the facts of the case." *Humphrey v. Boschung*, 287 Ala. 600, 253 So. 2d 769 (1971).

Therefore, where, as here, there has been no showing of any actual prejudice nor any showing that the pre-trial publicity (although admittedly extensive and widespread) was anything other than "factual," "truthful," "objective," and "reasonably free from any calls for action based upon emotional subjective judgments" (*Mathis v. State* [M. S. August 28, 1973], — Ala. App. —, — So. 2d —, and *Mathis v. State* [M. S. August 14, 1973], — Ala. App. —, — So. 2d —), I am unwilling to presume that the defendant was prejudiced.

And, while *Sheppard v. Maxwell,* supra, may place upon appellate courts "the duty to make an independent evaluation of the circumstances" surrounding cases involving pervasive pre-trial publicity, the Court of Criminal Appeals already has made such an evaluation in this case. See *Mathis v. State* [M. S. August 28, 1973], — Ala. App. —, — So. 2d —. The conclusion of that court was that the evidence "in the instant record did not support the defendant's motion for either a further continuance or a change of venue."

Accordingly, I agree that the writ should be quashed as improvidently granted.

Merrill, Coleman, Harwood, Maddox and McCall, JJ., concur.

Jones, Justice (dissenting).

This appeal is the consolidation of two cases which contain similar questions of law and fact. Buddy Herman Mathis, the appellant, was tried and convicted in two separate trials by the Circuit Court of Mobile County of obtaining money by false pretenses. One case involved kitchen equipment in four Mobile County Schools. The other case involved the removal of debris and repairs to Mobile County schools damaged by

Hurricane Camille. The convictions were upheld by the Court of Criminal Appeals. We granted certiorari on certain constitutional grounds, i.e., *fair trial and free press,* which is one of the most viable legal issues of the day.[1]

The question presented is whether or not the trial Court erred in refusing to grant the motion for change of venue because of adverse pre-trial publicity. The majority opinion quashes the writs as improvidently granted. Implicit in this ruling, and as expressed in the concurring opinion, is the conclusion that the "blinder" rule[2] effectively prevents our review of the opinions of the Court of Criminal Appeals. I do not disagree with the "court of last resort" premise on which this rule is based, but I strongly disagree with the majority's application of that rule in the instant cases for two basic reasons: 1. The finding by the Court of Criminal Appeals that "This publicity in nowise was to the prejudice of Mr. Mathis" is not a *true* finding of *fact;* it is instead a *legal conclusion* which is indeed the ultimate legal issue treated by that Court as dispositive of these appeals. 2. We are creating the enigma whereby this Court is inviting itself to be reviewed by the United States Supreme Court on a constitutional question that this Court itself has not reviewed.

The "court of last resort" premise, in my opinion, is given full expression by the narrow and limited grounds on which writs of certiorari may be granted (Rule 39). Once the writ is granted, however, which certifies the record of the entire proceedings to this Court, I have never been able to find any valid

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[1] See, e.g., *The Courts v. the News Media: Is the Conflict Necessary?,* Case & Comment, Vol. 79, No. 2 (March-April, 1974).

[2] A good statement of this rule is found in *Clayton v. Ragsdale,* 276 Ala. 321, 161 So.2d 804 (1964): "[O]n a review by certiorari of the judgments and opinions of the court, we are bound by the findings of fact by the Court of Appeals and may not go to the record."

basis—legal or logical—for the rule requiring this Court to wear blinders and to ignore what that record reveals.[3]

I would grant the writ, reverse and remand with instructions to the Court of Criminal Appeals to set aside the convictions and order new trials; and I would address the merits thusly:

While a detailed consideration of the facts is not necessary to the resolution of these appeals, a brief review may be helpful; accordingly, portions of the two Court of Criminal Appeals' opinions follow.

In the "kitchen equipment" case, Judge Cates, speaking for the Court of Criminal Appeals, stated:

> "The appellant, a construction contractor, and the Mobile County School Board entered into a contract for the renovation and repair of kitchen facilities at four Mobile County schools to be done in the 1969 summer vacation. Because of the short time available for completion, the Board awarded the contract without competitive bidding under the 'emergency' provision of the competitive bid law.
>
> "Inasmuch as new equipment was required along with the renovation, the Board authorized its staff to obtain bids on new kitchen equipment . . . It is appellant's conduct in regard to the equipment bidding and purchase that is the subject of this appeal.
>
> "The State introduced evidence tending to show that appellant and an alleged accomplice (an employee of the School Board) approached two commercial kitchen equip-

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[3] The only exception recognized by our cases is stated in a well-reasoned opinion by Justice Coleman in *Loyd v. State*, 279 Ala. 447, 186 So.2d 731 (1966), holding that the Supreme Court has the right to review the record in a case involving a constitutional question where the Court of Appeals makes *no* finding of fact. See also *Ex parte Buck*, — Ala. —, 287 So.2d 441 (1973).

ment suppliers and requested bids for needed equipment. Appellant allegedly led the equipment suppliers to believe that bids were to be made to him as the general contractor and directed both suppliers to add sums to their bids roughly representing appellant's claimed overhead and profit. These bids were opened in appellant's office.

"The accomplice then presented the upwardly revised bids to the School Board without advising the Board of the padding. The equipment contract was awarded to Mobile Fixture and Equipment Company with a low bid of $99,511.26. Officials of Mobile Fixture testified that their bid before the additions for appellant's 'overhead and profit' was $86,595.00. After adjustments to the contract a payment of $95,104.26 was made to Mobile Fixture. Mobile Fixture then paid $12,388.26 to the appellant. Testimony of the accomplice indicated that he expected to receive gain from Mathis for his role in the scheme 'down the road.' "

In the "Hurricane Camille" case, Judge Cates briefly set out the facts as follows:

"August 17, 1969, a hurricane came ashore in Mobile County. The Board of School Commissioners awarded a cost plus contract for school repairs to Mathis without public bidding.

"According to the tendencies of the State's evidence, Mathis, with (or at the instigation of) an employee of the Board submitted false invoices from subcontractors. It was inferrable that Mathis and this employee advised certain subcontractors and materialmen who had either done little or no work on particular schools, to inflate their bills and kick back to Mathis and his accomplice. In at least one instance they got blank invoice forms of a subcontractor, filled them out, and ran them through the Board's fiscal machinery to their profit.

"Mathis defended, essentially, on a lack of scienter. He was then being harassed by creditors in other undertakings. This financial distraction, he said, kept him from realizing that he was participating in a fraudulent scheme. Mathis claimed, for example, that he thought he was giving a year's maintenance guaranty on the roofs of the schools involved.

"The State, in rebuttal, countered the thrust of Mathis's testimony by producing the putative accomplice who testified that Mathis participated in the decision to make false invoices and send them to the Board as bills.

"This witness . . . testified without objection that the change from billing for damaged schools to also billing for schools not damaged was prompted by greed, '. . . partly mine and partly Mr. Mathis's.' "

The purported frauds were first discovered by the *Mobile Press Register* which, in a series of articles, exposed the misappropriation of school funds. The newspaper began the series in December of 1969. On April 10, 1970, Mathis was indicted by a Grand Jury, and arrested two days later. Trial was set for December. The coverage by the media during the interim was heavy and continuous. Mathis was involved in civil litigation connected with the school fraud scheme, and suffered judgments of $16,000 and $66,000. These cases and the trial of Don Pennell,[4] in which Mathis' name was prominantly mentioned, kept Mathis in the public's eye. Because of the great publicity, Mathis' attorney filed motions for change of venue and continuance, but the motions were denied.

From the time the *Press Register* first alleged misappropriation of public funds, until the completion of appellant's trial—

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[4] Don Pennell was the employee of the School Board who was the alleged accomplice of Mathis referred to in the Court of Criminal Appeals' opinions.

approximately a year and one half—more than 800 news articles, contained in 8 volumes of the record, appeared; and appellant's name was repeatedly broadcast over three television and fourteen radio stations.

It is crucial at this point to recognize the outstanding service performed by the dedicated reporting of the media and especially staff reporter Bill Sellers. As the Court of Criminal Appeals commented, the reporting was more or less objective in the light of the testimony developed at trial. While the media is often criticized, the service here performed in standing as centurion of the public trust is a strong commendation for the *free press* that the authors of the First Amendment to the United States Constitution envisaged.

This dissent should in no way be interpreted as a slap at the constitutional guaranties of a *free press*. What this dissent does stand for is the principle that guaranties of the Sixth Amendment stand on an equal footing with the Fifth Amendment; and, accordingly, we must make sure that the fundamental rights asserted by the Sixth Amendment and made applicable to the states by the Fourteenth Amendment are not lost through the abstract application of the First Amendment.

We are not faced with the hypothetical question of releasing one who is actually guilty because of the exercise of the First Amendment rights of *free press* to such an extent that the accused cannot get a fair trial in any jurisdiction. All that the defense counsel sought was a change of venue (or a continuance) to assure that his client received a *fair trial* before an *impartial jury*.

While the pre-trial publicity was extensive[5] and the trial judge would have had good cause to grant Mathis' pre-trial motion

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[5] On *voir dire*, one of the jurors, responding to a question by the defense counsel, in effect characterized the pre-trial publicity as the most extensive in Mobile history.

for change of venue,[6] once the venire was called and *voir dire* commenced, the obvious effect of the publicity should have removed any doubts as to his duty to grant the change of venue motion (or requests for a continuance). With the exception of one panel, the trial judge refused to instruct the prospective jurors not to read news reports, etc., about the trial, and the *voir dire* reveals that in the absence of such instructions, the veniremen continued to be engulfed with publicity even during jury selection.

The Court of Criminal Appeals in applying the law to the facts stated: "This publicity in nowise was to the prejudice of Mr. Mathis."

On *voir dire*, the impact of the pre-trial publicity was evident; almost all prospective jurors testified that they had some knowledge as to the case to be tried. When asked if they could completely divorce this prior knowledge from the facts to be presented at trial and thus render a fair and impartial verdict, numerous prospective jurors gave doubtful responses. This can be illustrated by the *voir dire* examination of Luther James, Jr.

> "Q. [Binder] Now, I am conerned as Counsel for Mr. Mathis, Mr. James, with the fact that you know some of the facts of this case, and I want to explain my next question to you and I am saying this to you with all due sincerity, I am concerned with the fact that if you were selected as a juror in this case, that perhaps in the next two or three days you might be sitting here as a Juror and something might come from the witness stand that

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[6] In *Rideau v. Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed. 2d 663 (1963), the Court, without examining the transcript of the *voir dire*, held that the petitioner was constitutionally entitled to a change of venue from a community that had been saturated with a televised interview of the defendant in which he confessed certain crimes.

might correlate in your mind and in your subconscious mind some of those facts you previously read about in this case. That is what I am concerned about.

"Now, I am concerned, and I ask you: You can't assure this Court, can you, that if you sat on this Jury and something was said from the stand there that you previously read about in the headlines, that it wouldn't strike a bell and influence you in some manner, you can't promise us that, can you?

"A. [James] Honestly, I probably, couldn't, subconsciously, it would probably have an effect, subconsciously.

"Q. And didn't you read various and sundry subcontractors' testimony in the newspaper about what they had done?

"A. Right.

"Q. And you have read that testimony?

"A. Right.

"Q. And you have said to the Court and you can't tell us that may not have an effect on you, you can't say that, can you?

"A. No, sir.

"Q. In other words, you are going to do your best, if you are chosen as a Juror, to be impartial and you swear to tell the truth, but you don't mean to imply that when you read or when you heard some of the testimony from someone and you had heard some testimony or read some testimony before that in the Pennell trial, you are not telling us that wouldn't have an effect on you? Isn't that what you are saying?

"A. Let's put it this way: I will be honest with you, there is a possibility.

* * * * * * *

"Q. But, you can't assure me absolutely that you would remain a fair and impartial Juror with all the facts that have been presented to you?

"A. Could anybody?

* * * * * * *

"Q. And you don't think they have had any impression on you and your wife and all the talking you have done about this case?

"A. Well, there has been talk and everybody has an opinion.

"Q. They do?

"A. Well, sure they do.

* * * * * * * *

"Q. And do you remember their names [from the pre-trial publicity]?

"A. There was a Mr. Crane, Mr. Smith and Mr. Pennell that I recall."

Defense counsel challenged this juror for cause but the trial judge overruled this challenge. The Court of Criminal Appeals stated, "Some jurors when asked if they had fixed opinions gave equivocal answers." An examination of the *voir dire* shows that Mr. James was representative of the venire. And yet, the Court below concluded that "This publicity in nowise was to the prejudice of Mr. Mathis."

The rule, first stated by Justice Holmes in 1907, remains that "the theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence whether of private talk or public print." *Patterson v. Colorado,* 205 U.S. 454, (462), 27 S.Ct. 556, 51 L.Ed. 879 (1907). The Alabama Constitution specifically provides "That in all criminal prosecutions the

accused has a right to . . . a speedy public trial by an impartial jury of the county or district in which the offense was committed . . ." Ala. Const., Art. I, § 6 (1901). The United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment of the Constitution incorporates the guaranties of the right to trial by an impartial jury of the Sixth Amendment; thus it is applicable to state criminal trials. *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

The leading decision in this area of the law is *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), in which the Court set down the basic tenets that should be followed by both trial and appellate courts.

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellant tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity."

In an effort to prevent local publicity from interfering with the right to a fair and impartial trial, one of the procedures most often used by a defendant is to move for a change of venue. This right is authorized in Alabama by statue. Alabama Constitution, Art. I, § 6 (1901); Tit. 15, §§ 267-75, Code of Alabama 1940 (Recomp. 1958). On a motion for change of

venue in a criminal case, the defendant has the burden of showing, to the reasonable satisfaction of the trial court, that a fair and impartial trial cannot be had and an unbiased verdict cannot be reasonably expected. *Boutwell v. State*, 279 Ala. 176, 183 So.2d 774 (1966).

To what degree prejudice must be shown in order to warrant a change of venue in federal court is not well settled, and, in fact, is in much doubt in light of recent decisions. It may well take a decision by the Supreme Court of the United States to effectively settle a dispute which has apparently arisen among the federal circuits. For example, the Fifth Circuit has held that in the absence of demonstrable jury prejudice, or highly pervasive and prejudicial publicity, no reversible error arises because the trial court refused to grant a continuance or to declare a mistrial on the grounds of prejudicial publicity. *Hale v. United States*, 435 F.2d 737 (5th Cir., 1970).

However, the Third Circuit recently stated, "Not only is it no longer necessary that a defendant show that the jury actually was prejudiced, since *Rideau* it is not necessary to show that prejudicial material actually reached the jury, and thus infected the trial." *United States ex rel. Doggett v. Yeager*, 472 F.2d 229, 238 (3rd Cir., 1973). The Court in *Doggett* adopted precepts set out by the American Bar Association Project on Minimal Standards for Criminal Justice in *Standards Relating to Fair Trial and Free Press* (hereinafter referred to as ABA Project), which were also cited by the Court below.

> "3.2 Change of venue or continuance.
>
> "It is recommended that the following standards be adopted in each jurisdiction to govern the consideration and disposition of a motion in a criminal case for change of venue or continuance based on a claim of threatened interference with the right to a fair trial.
>
> ". . .

"(c) Standards for granting motion.

"A motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. A *showing of actual prejudice shall not be required.*" [Emphasis supplied.]

It is well settled that, although a state must at least meet the minimum safeguards required by the United States Consitution, the state is not limited to those standards, and may impose greater protection. For example, although the Sixth Amendment does not require a twelve-man jury, this Court has stated that the Alabama Constitution confers that right to its citizens. Compare *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), with *Collins v. State*, 88 Ala. 212, 7 So. 260 (1889). See also *Gilbreath v. Wallace*, —Ala.—, —So. 2d— (1974). Therefore, we need not concern ourselves with the conflicts of the federal circuit courts, but must decide what standards are dictated by Art. I, § 6 of the Alabama Constitution, which consistently has been interpreted as at least meeting, if not surpassing, its federal counterpart. The continual growth of the reach and scope of the news media requires increasingly vigilant protection of the defendant's right to an impartial jury. For that reason, and guided by the high standards imposed by our Constitution, I would adopt the rationale of *Doggett* and the pertinent sections of the A.B.A. Project recommendations.

The role of the appellate court has been expanded by recent decisions. It has been held that, since the grant or denial of a motion for change of venue in a criminal case is a matter of discretion in the trial court, an appellate court will reverse the

trial court's ruling only where an abuse of discretion plainly appears. *Cobern v. State*, 273 Ala. 547, 142 So.2d 869 (1963).

This general rule has been changed by *Sheppard* which adds the requirement that an appellate tribunal must make an independent evaluation of the circumstances and decide for itself if the measures taken by the trial court were sufficiently strong to ensure that the balance did not weigh against the accused. *Doggett*, supra, at p. 239.

Thus, the two questions which the Alabama Supreme Court should answer are: (1) Were the materials involved of such a nature as to arouse bias and prejudice towards the appellant, and (2) If the materials were of a prejudicial nature, did the trial court take sufficient precautions in the selection of the jury to prevent this prejudice from invading the courtroom?

The nature, timing, and frequency of the publicity should be carefully weighed with two major considerations in mind at all times—the public's right to know and the individual's right to a fair trial. There will always be a certain degree of publicity surrounding newsworthy criminal prosecutions. To grant a motion for change of venue for every case which has received the slightest degree of notoriety would result in the removal or continuance of virtually every trial. The case at bar, however, has exceptional characteristics.

The media first exposed the alleged wrongdoings and therefore gave them special and widespread coverage. The subject matter, defrauding the public schools, was of an inflammatory and sensational nature. The trial of Don Pennell, in which appellant's name was prominently mentioned, received much coverage. Finally, the coverage was sustained for a year and a half before appellant was brought to trial.

The undeniable effect that these series of articles had upon the community of Mobile County was to arouse public suspicions which centered on a small group of persons among which

Mathis was a prominent member. The media reports may well have been factually correct, but this alone would not prevent them from causing prospective jurors to form pre-trial opinions as to the appellant. Rather, it could be that a well-documented report would have the opposite effect in that it would be all the more believable.

I would hold that the denial of the *initial* motion for change of venue (the pre-trial motion) constituted reversal error. Admittedly, a case may be made for the proposition that this was within the discretionary power of the trial court, contending that, while the amount of material was great, the area from which the venire could be drawn was populous and could provide a large reservoir of prospective jurors. *Godau v. State*, 179 Ala. 27, 60 So. 908 (1913). Assuming, arguendo, the correctness of this initial ruling, we are yet faced with the trial Court's denial of the motion following *voir dire*.

Here, because the publicity was so myriad and widespread, the problem of jury prejudice was a serious one and selection of the jury should have been exercised with great care. The line which divides the prospective jurors into acceptable and unacceptable classes is a fine one causing jury selection to be tiresome and tedious for the jurors and the court. Notwithstanding, the right to a fair trial is so fundamental and basic to American jurisprudence as to require the intricate and time-consuming methods by which an impartial jury may be selected. To sacrifice impartiality in the interest of expediency is the ultimate denial of due process.

The guidelines which a trial judge must follow in this task are imprecise. He must balance the ideals inherent in the words of the Alabama and United States Constitutions with the realities of a society with swift and diverse communications media. The selection of a jury completely free from knowledge of the case is not constitutionally compelled. "It is not required . . . that jurors be totally ignorant of the facts and issues involved

. . . It is sufficient if the juror can lay aside his impression or opinion and render a fair verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722-23, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).

Although knowledge of certain facts of the case by prospective jurors in and of itself cannot be equated with jury prejudice, it signals the need for a careful and searching *voir dire* to insure that the minimum constitutional guaranties are met.

In the instant case, while the spirit of the first aspect of this rule was fully complied with by permitting counsel wide latitude in his examination of prospective jurors, the Court negated its effective purpose by denying the motion for change of venue in face of the information developed on such *voir dire*. Otherwise stated, unless the second aspect of the rule—to insure the minimum constitutional guaranties—is complied with, the wide latitude of *voir dire* is rendered perfunctory at best, or a compounding of the prejudicial effect at worst, in the context here applicable.

Because of the tremendous pre-trial publicity which permeated the community—and its potentially prejudicial effect—the prudential course would have been to grant the original motion for change of venue; and, while I would so decide, the continued responses showing prior knowledge and opinions of the case by prospective jurors should have removed any doubt as to the proper course. In my opinion, then, the denial of the motion for change of venue *following* the selection of the jury was reversible error.

The A.B.A. Project set the standard to be followed in the selection of a jury in cases in which questions of possible prejudice are raised.

"3.4 Selecting the jury.

". . .

"(b) Standard of acceptability.

"Both the degree of exposure and the prospective juror's testimony as to his state of mind are relevant to the determination of acceptability. A prospective juror who states that he will be unable to overcome his preconceptions shall be subject to challenge for cause no matter how slight his exposure. If he has seen or heard and remembers information that will be developed in the course of trial, or that may be inadmissible but is not so prejudicial as to create a substantial risk that his judgment will be affected, his acceptability shall turn on whether his testimony as to impartiality is believed. If he admits to having formed an opinion, he shall be subject to challenge for cause unless the examination shows *unequivocally* that he can be impartial. A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to his testimony as to his state of mind." [Emphasis supplied.]

The right to a trial by a fair and impartial jury is fundamental to the ideal of due process. When an appellate court finds the defendant has received anything less than our Constitution requires, it has a duty to overturn the conviction and remand for a new trial. I would so find and I would reverse and remand.

Faulkner, J., concurs.

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 9 day of May, 1974.

/s/ J. O. SENTELL
Clerk, Supreme Court of Alabama

APPENDIX B

August 14, 1973

The State of Alabama—Judicial Department
The Alabama Court of Criminal Appeals

October Term, 1972-73

1 Div. 139

Buddy Herman Mathis, Alias

v.

State

Appeal from Mobile Circuit Court

Cates, Presiding Judge

False pretense: sentence, seven years imprisonment.

I

August 17, 1969 a hurricane came ashore in Mobile County. The Board of School Commissioners awarded a cost plus contract for school repairs to Mathis without public bidding.

According to the tendencies of the State's evidence, Mathis, with (or at the instigation of) an employee of the Board submitted false invoices from subcontractors. It was inferable that Mathis and this employee advised certain subcontractors and materialmen who had either done little or no work on particular schools, to inflate their bills and kick back to Mathis and his accomplice. In at least one instance they got blank invoice forms

of a subcontractor, filled them out, and ran them through the Board's fiscal machinery to their profit.

Mathis defended, essentially, on a lack of scienter. He was then being harassed by creditors in other undertakings. This financial distraction, he said, kept him from realizing that he was participating in a fraudulent scheme. Mathis claimed, for example, that he thought that he was giving a year's maintenance guaranty on the roofs of the schools involved.

The State, in rebuttal, countered the thrust of Mathis's testimony by producing the putative accomplice who testified that Mathis participated in the decision to make false invoices and send them to the Board as bills.

This witness (R. 1818) testified without objection that the change from billing for damaged schools to also billing for schools not damaged was prompted by greed, "* * * partly mine and partly Mr. Mathis's."

The conflict in the evidence was under our jurisprudence a classical case for the jury to resolve which they did with their verdict.

II

This case is a companion case to 1 Div. 217. In that case there was a claim that Mathis was awarded an earlier contract without competitive bids on the grounds of an emergency.

Thus, the hurricane having hit in August, by the 19th of December 1969 the Mobile Press Register reported an award of contracts without competitive bids on the grounds of an emergency. Then, on the 4th of January 1970 there was an editorial in the Mobile Press Register, the morning newspaper, entitled "Questions for Board." This editorial made no call for

criminal proceedings, but rather raised questions as to the motivation for ignoring the competitive bid law. On the 7th of January the newspaper published an article entitled "Insurance Adjusters Probe School Hurricane Claims."

On April 10, 1970 a grand jury indicted Mathis. In the instant case the indictment alleged a false pretense made to the Board of School Commissioners, Mobile County, regarding the repair of fifty-nine school buildings, purportedly damaged by the August hurricane.

On May 21, 1970, Mathis filed a motion for change of venue, alleging among other grounds the undue publicity he claimed resulting from various newspaper articles.

Mathis filed two amendments to his motion for change of venue and also filed a motion for continuance setting forth virtually the same grounds as set out in the motion for change of venue. These motions were overruled by the court after a hearing prior to trial. This hearing embraced a wide range of evidence, including stipulations as to the number of listeners to various radio stations, the viewing area of various television stations, the opinion of different witnesses as to whether or not Mathis could receive a fair trial in Mobile County and matters of similar import. A motion for continuance, as well as a motion for change of venue were denied. (R. 203)

We have carefully reviewed the newspaper clippings which were sent up as exhibits in addition to the testimony appearing in the record. We have examined these under the strictures of the opinion of the Supreme Court of the United States in *Sheppard v. Maxwell*, 384 U. S. 333, and under further consideration of the Standards of Criminal Justice enunciated by the American Bar Association. Thus, under the Standards entitled Fair Trial and Free Press, § 3.2 provides:

"Change of Venue or Continuance.

"It is recommended that the following standards be adopted in each jurisdiction to govern the consideration and disposition of a motion in a criminal case for change of venue or continuance based on a claim of threatened interference with a right to a fair trial.

"(a) Who may request.

"Except as federal or state constitutional provisions otherwise require, a change of venue or continuance may be granted on motion of either the prosecution or the defense.

"(b) Methods of proof.

"In addition to the testimony or affidavits of individuals in the community, which shall not be required as a condition to the granting of a motion for change of venue or continuance, qualified public opinion surveys shall be admissible as well as other materials having probative value.

"(c) Standard for granting motion.

"A motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. This determination may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. A showing of actual prejudice shall not be required.

"(d) Same; time of disposition.

"If a motion for change of venue or continuance is made prior to the impaneling of the jury, the motion shall be disposed of before impaneling. If such a motion is permitted to be made, or if reconsideration or review of a prior denial is sought, after the jury has been selected, the

> fact that a jury satisfying prevailing standards of acceptability has been selected shall not be controlling if the record shows that the criterion for the granting of relief set forth in subsection (c) has been met."

We believe that the newspaper publicity in this instance bears a notable distinction from that condemned in *Sheppard v. Maxwell*, supra, in that the writing in this case was based primarily upon what later developed to be the facts adduced in evidence. In other words, the writing was more or less objective in the light of the testimony developed at trial. It was reasonably free from any calls for action based on emotional subjective judgments.

There was relatively little publicity involving the defense attorney or the prosecution attorney except for some references to a political campaign engaged in by the District Attorney in which his opponent was one of the Public Defenders who later, upon successful election, prosecuted Mathis in the trial of the companion case, *Mathis v. State*, 1 Div. 217. This publicity in nowise was to the prejudice of Mr. Mathis. Moreover, we would note that the trial of both of these cases was postponed from the call of the criminal docket immediately following the indictment until, in this case, the 9th of December 1970.

Thus, with respect to objective reporting we find the Court of Appeals of New York in *People v. Di Piazza*, 24 N. Y. 2d 342, 300 N. Y. S. 2d 545, 248 N. E. 2d 412 saying:

> "* * * Whether or not a change of venue should be granted rests in the sound discretion of the trial court (see, e. g., *People v. Buchalter*, 289 N. Y. 244; *People v. Hyde*, 149 App. Div. 131, 134, *supra*), and a number of cases have held that newspaper comment alone, even though extensive, 'does not establish inability to get a fair trial.' (*People v. Broady*, 195 Misc. 349, 350; see *People v. Hyde*, 149 App. Div. 131, *supra.*) Moreover, the court's

discretion will not be disturbed unless the newspaper articles are of such a sensational character as to excite local popular passion and prejudice so that the defendant will not be able to have the fair trial to which he is entitled.

"In the case before us, there was no such proof of passion or prejudice. Although the community was small and the defendant's crime and the events leading up to it widely known, the pre-trial newspaper accounts were surprisingly objective. The victim's funeral and the members of her family were sympathetically portrayed and the defendant's action was described as having caused a widespread reaction and aroused deep feeling. But there was very little written that could be said to be affirmatively hostile to him. * * *"

To establish a basis for a Common Law inductive analogy we turn to *Maine v. Superior Court*, 68 Cal. 2d 375, 66 Cal. Rptr. 724, 438 P. 2d 372. From the opinion we excerpt:

"In the case at bench petitioners are accused of crimes of the gravest consequence. They are strangers to Ukiah, a small community where they have been held for trial. On the other hand, the two victims, a popular teenage couple from respected families in the area, were assaulted under circumstances that would compel any community's shock and indignation. * * *

"One of the victims, the girl, was discovered on a public road nearly unconscious with bullet wounds about her neck and head. Her condition was critical and several complicated operations were performed to save her life. Local citizens immediately organized a fund to help the girl's parents defray the medical expenses, and the Ukiah Daily Journal, the local newspaper, urged every citizen to contribute. It is no small measure of the community's laudable warmth and generosity that a substantial sum was

quickly raised, mostly in modest contributions. We do not hold it to be an invariable rule that sympathy for a victim demonstrates antipathy to the alleged perpetrators of an offense. But such pervasive civic involvement in the fate of a victim, particularly when the events all transpire in a relatively small community, is a strong indication that the venue should be changed."

* * * * * * * *

"* * * Principally at fault appears to be an official of the State of Washington, where petitioners are also charged with murder, who revealed that one of the petitioners had confessed and placed full responsibility on the other for the crimes. This disclosure received substantial attention in the local newspaper, and it is undoubted that the existence of a confession is now common knowledge in the community. The admissibility of the confession into evidence has not been tested in a judicial hearing, however, and its premature release must be regarded as potentially prejudicial to petitioners. When such a disclosure occurs in a small community, the only effective remedy, if the defense so requests, is to change the venue. Indeed, failure to seek a change of venue may suggest to a reviewing court on appeal that no prejudice was suffered by the defendant. * * *"

* * * * * * * *

"* * * While a lengthy continuance might sufficiently protect the accused in some cases, it does not do so here. Delays may be an efficacious antidote to publicity in medium-size and large cities, but in small communities, where a major crime becomes embedded in the public consciousness, their effectiveness is greatly diminished. (See Friendly and Goldfarb, Crime and Publicity (1967), p. 79.) * * *"

And we note in *United States v. Halfen*, 467 F. 2d 127 (1972), that the Circuit Court made this observation:

"* * * Our examination of this record, moreover, compels the conclusion that there was no such prejudicial publicity as to constitute a denial of constitutional rights. The adverse publicity in this case consisted largely of several references to the appellant in a San Antonio newspaper, linking him with the Mafia. *There was no such 'saturation of publicity' as was present in those cases which have found denials of the right* to a fair trial due to prejudicial publicity. *See, e. g.*, Sheppard v. Maxwell, 1966, 384 U. S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600; Williams v. Dutton, 5th Cir. 1968, 400 F. 2d 797, cert. denied, 1969, 393 U. S. 1105, 89 S. Ct. 908, 21 L. Ed. 2d 799."

In *Maine*, supra, and *Di Piazza*, supra, both courts adverted, among other things, to the impact of publicity in a thinly populated county as contrasted with the more rapid dissipation in a metropolitan area. This reference seems to rely on the observation that a pebble's ripples are relatively less on a big pond than on a small one.

Here the venue was Mobile County, the second most populous in the State, with 317,308 inhabitants at the 1970 census. Adjoining is Baldwin with nearly 60,000 people. By our standards this is a metropolitan area. We consider the dissipation factor of publicity or its evanescence in a metropolitan area to be a phenomenon which a trial judge may reasonably bear in mind when weighing a motion for a change of venue. See *Beddow*, 39 Ala. App. 29, 96 So. 2d 175.

Moreover, the existence of widespread publicity alone does not indicate that a defendant will not get a fair trial. The law focuses on the impartiality of the trial jury. *Mathis*, 280 Ala. 16, 189 So. 2d 564; *Beecher*, 288 Ala. 1, 256 So. 2d 154.

Here the voir dire of the jurors—mostly about the effect of publicity—took up several hundred pages of the court reporter's transcript.

As we ourselves observed in *Dannelly*, 47 Ala. App. 363, 254 So. 2d 434, the matter of publicity is sometimes not remediable by a change to the next county, but may have to be solved by way of a continuance so that the ripples of the publicity die down.

In this case we think the delay from the spring of 1970 until late autumn, in the absence of further proof from that shown in the instant record did not support the defendant's motion for either a further continuance or a change of venue.

We believe that in the nature of his crime some publicity was inevitable as a consequence. Realistically, the open conduct of public affairs is a matter on which Mathis could not rely to avoid being tried for a false pretense to a public body.

Having elected to do business with the school board, which he, of course, is presumed to know (and did in fact indicate that he knew) was a public body. Mathis is in no position to say that these are covert private affairs like Swiss bank accounts.

Newspapers are entitled to examine what went on at the school board. So long as the reporting is factual and objective, then there can be no complaint because of an incidental exposure. The exposure was corroborated in this instance by the evidence.

There was no undue call for a witch hunt or any strong or unusual punishment in any of the articles or editorials which were submitted to us. There were no calls for mob action, such as we find in some of the opinions of the Supreme Court as having vitiating influence on verdicts. Altogether the reporting was essentially truthful. While it might have related the two cases as intertwined, these actions were of a common pattern and therefore, while properly not submitted to the same jury, nevertheless, to put them together into the newspapers was not, in our opinion, prejudicial.

III

We have examined the entire record under Code 1940, T. 15, § 389 and consider that the judgment below is due to be

Affirmed.

Cates, P. J., Almon and De Carlo, JJ., concur. Harris, J., concurs in result. Tyson, J., not sitting.

August 28, 1973

The State of Alabama—Judicial Department
The Alabama Court of Criminal Appeals

October Term, 1972-73

1 Div. 217

Buddy Herman Mathis, alias

v.

State

Appeal from Mobile Circuit Court

Cates, Presiding Judge

False pretense (Code 1940, T. 14, § 209): sentence, eight years in the penitentiary.

The indictment follows code form, T. 15, § 259, Form No. 60, and is couched in three counts. The jury's verdict was general; hence, if the evidence can support any of the three counts, the verdict is due to be sustained. We hold that it does.

I

The appellant, a construction contractor, and the Mobile County School Board entered into a contract for the renovation and repair of kitchen facilities at four Mobile County schools to be done in the 1969 summer vacation. Because of the short time available for completion. the Board awarded the contract without competitive bidding under the "emergency" provision of the competitive bid law.

Inasmuch as new equipment was required along with the renovation, the Board authorized its staff to obtain bids on new kitchen equipment. (R. 495-496). It is appellant's conduct in regard to the equipment bidding and purchase that is the subject of this appeal.

The State introduced evidence tending to show that appellant and an alleged accomplice (an employee of the School Board) approached two commercial kitchen equipment suppliers and requested bids for needed equipment. Appellant allegedly led the equipment suppliers to believe that bids were to be made to him as the general contractor and directed both suppliers to add sums to their bids roughly representing appellant's claimed overhead and profit. These bids were opened in appellant's office.

The accomplice then presented the upwardly revised bids to the School Board without advising the Board of the padding. The equipment contract was awarded to Mobile Fixture and Equipment Company with a low bid of $99,511.26. Officials of Mobile Fixture testified that their bid before the additions for appellant's "overhead and profit" was $86,595.00. After adjustments to the contract, a payment of $95,104.26 was made to Mobile Fixture. Mobile Fixture then paid $12,388.26 to the appellant. Testimony of the accomplice indicated that he expected to receive gain from Mathis for his role in the scheme "down the road."

Appellant's defense was, apparently, that he had no criminal intent, and the amount he added to the bids represented his labor and supervision in regard to the installation of the kitchen equipment. Appellant did not testify.

The State contended that all of appellant's compensation was to come from his renovation contract, and that the additions to the bids of equipment suppliers was a false representation to the Mobile County School Board. Certainly it was a malicious interference with the Board's freedom to contract.

II

Appellant filed a plea in abatement, demurrer to the indictment, motion to dismiss, and motion for change in venue.

Subsequently, appellant filed two amended motions for change of venue, and an additional motion for continuance.

All of the above motions and pleas were denied and overruled. Appellant asserts these rulings as error.

This case is a companion case to *Mathis v. State*, 1 Div. 139, in which this Court decided that pretrial publicity, as evidenced by a collection of newspaper articles by stipulation made a part of the record of the present case, was not so prejudicial as to deny appellant a fair trial in Mobile County.

There we held that the relatively objective and truthful reporting of events of public interest in a county of more than 317,000 population was not prejudicial, where the trial occurred in December, 1970, following an April indictment. *Sheppard v. Maxwell*, 384 U. S. 333, was distinguished. Further discussion here is unnecessary.

Here the indictment was handed down April 10, 1970. Mathis went to trial on June 21, 1971, i.e., fourteen months later.

III

Some jurors when asked if they had fixed opinions gave equivocal answers. Further interrogation brought out in each case the juror could conscientiously lay aside his predilection and go by the evidence and the court's charge.

The appellant contends that this in effect is a sophistical way of denigrating the stature of the presumption of innocence which cloaks the accused. We advert to Code 1940, T. 30, § 55, subdiv. 7, which reads:

> "It is a good ground for challenge by either party:
>
> * * *
>
> 7. That he has a fixed opinion as to the guilt or innocence of the defendant, which would bias his verdict.
>
> * * *."

In searching for a definition of a fixed opinion, our Supreme Court in *Long*, 86 Ala. 36, 5 So. 443, stated:

> "* * * The mere formation of an opinion founded on rumor or hearsay, which is subject to change on hearing the evidence, and leaves the mind of the juror free to impartially consider the whole evidence, without giving undue credence to that which tends to prove the facts as heard, and to apply to the evidence the law as pronounced by the court, is not sufficient to disqualify. But an opinion, whether founded on rumor, or conversations with witnesses, or on observation, which is a conviction, a prejudgment, disqualifying the juror to impartially consider the whole evidence—that which tends to prove the facts as heard, as well as that which contradicts or explains—and to apply free from bias the law as given in charge by the court, is a fixed opinion which will bias the verdict. The mind of the juror should be in such a state of freedom,

that he is capable of giving to the accused the weight of the presumption of innocence, and the benefit of a reasonable doubt. The statute affirms, in concise, intelligible, and comprehensive language, the common-law rule, as declared by Chief-Justice Marshall on Burr's trial: 'That light impressions, which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him'."

The United States Supreme Court has adopted the essentially same meaning. In *Irvin v. Dowd*, 366 U. S. 717, we find:

> "* * * It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. * * *"

Counsel for appellant was given (and took) the opportunity to extensively interrogate each prospective juror as to his opinion of the guilt or innocence of the accused. A reading of the over 300 pages of voir dire in the transcript shows that the trial judge was most conscientious in determining which prospective jurors had abiding fixed opinions, and in excusing these persons from serving on the venire.

IV

Appellant argues that his demurrer to the indictment, notably grounds I and II, should have been sustained because of vagueness. Concededly the Code form was used.

Of course, it is elemental constitutional law that a Legislature may not validly compress an indictment into such a meaningless

acronym or other shorthand that the instrument fails to tell the prisoner of what he stands accused. 41 Am. Jur. 2d, Indictments and Informations, §§ 78 and 79.

In *United States v. Hess*, 124 U. S. 483, the indictment omitted the quo modo of Hess's alleged scheme to use the mails to defraud.

The opinion states (124 U. S. at 486) pertinently:

> "The statute is directed against 'devising or intending to devise any scheme or artifice to defraud,' to be effected by communication through the post-office. As a foundation for the charge, a scheme or artifice to defraud must be stated, which the accused either devised or intended to devise, with all such particulars as are essential to constitute the scheme or artifice, and to acquaint him with what he must meet on the trial.
>
> "The averment here is that the defendant, 'having devised a scheme to defraud divers other persons to the jurors unknown,' intended to effect the same by inciting such other persons to communicate with him through the post-office, and received a letter on the subject. Assuming that this averment of 'having devised' the scheme may be taken as sufficiently direct and positive, the absence of all particulars of this alleged scheme renders the count as defective as would be an indictment for larceny without stating the property stolen, or its owner or party from whose possession it was taken."

Here the statute (Code 1940, T. 14, § 209) reads:

> "* * * Any person, who, by false pretense or token, and with the intent to injure or defraud, obtains from another any money or other personal property, shall on conviction, be punished, as if he had stolen it."

In the instant indictment the charging part of the first count read as follows:

> "* * * that * * * Buddy Herman Mathis * * * did falsely pretend to the Board of School Commissioners of Mobile County, a public corporation, with intent to defraud, that he had received a legitimate bona fide bid from Mobile Fixture and Equipment Company, incorporated, in the amount of ninety nine thousand, five hundred eleven dollars and twenty-six cents to sell to the said Board of School Commissioners of Mobile County, a public corporation, kitchen equipment for installation in connection with work said Buddy Herman Mathis, alias B. H. Mathis, doing business as B. H. Mathis, Contractor, was to perform as general contractor in renovating kitchens at Booker T. Washington Junior High School, Palmer School, Bienville School and Carver Junior High School, public schools in Mobile County, Alabama, and by means of such false pretense obtained from said Board of School Commissioners of Mobile County, a public corporation, for said Mobile Fixture and Equipment Company, incorporated, after sales tax had been deducted from said ninety nine thousand five hundred eleven dollars and twenty-six cents, the sum of ninety five thousand one hundred four dollars and twenty-six cents of which said money he received twelve thousand three hundred eighty eight dollars and twenty-six cents from Mobile Fixture and Equipment Company, incorporated, against the peace and dignity of the State of Alabama."

This indictment specifically charges the appellant with obtaining money, $12,388.26, by means of false pretense. The indictment describes the false pretense as appellant's representation to the party defrauded, the Mobile County School Board, that he had received a *"legitimate bona fide bid"* from Mobile Fixture and Equipment Company. The indictment sets out

additional facts identifying the bid, i.e., the amount of the bid, and that the bid was for kitchen equipment purchased in connection with kitchen renovation work done by appellant at the four named schools. Much of State's evidence went to show that the bid in question was not a legitimate, bona fide bid, but rather a five-percenter's scheme to defraud the School Board.

When viewed within the mandate of *Jinright*, 220 Ala. 268, 125 So. 606, the indictment seems to reasonably inform appellant of the charges against him, together with sufficient facts to enable him to prepare his defense.

V

The performance by Mathis of the renovation contract was the occasion of another indictment. In the course of the trial sub judice the State put Mathis's accomplice on the stand. The witness, who had been theretofore convicted, testified that he had negotiated the renovation contract with Mathis for the Board.

The agreed price, this testimony tended to show, was puffed up $100,000 above what the witness thought was fair and reasonable. The appellant claims that the admission of testimony, over objection, concerning the renovation transaction, was prejudicial.

However, we consider that the formation of this contract and the negotiation could be viewed as the occasion for Mathis's persuading Mobile Fixture into submitting its bid to him. In a broad sense, the other contract, also perpetrated with the same accomplice employee of the Board, was of the res gestae of the charged offense. See *Gassenheimer*, 52 Ala. 313.

Also, this testimony of an "inside job" was relevant as to the modus operandi used by Mathis. *Brown*, 37 Ala. App. 516, 74 So. 2d 273 (fake lottery tickets).

We have carefully reviewed the entire record under the command of Code 1940, T. 15, § 389 and consider that the judgment below is due to be

Affirmed.

All the Judges concur.

APPENDIX C

May 9, 1974

The State of Alabama — — — Judicial Department

The Supreme Court of Alabama

October Term, 1973-74

Ex parte: Buddy Herman Mathis, Petitioner, SC 555 and SC 556, Petitions for Writ of Certiorari to Court of Criminal Appeals.

(In Re: Buddy Herman Mathis, Alias
v.
State)

Per Curiam.

Petitions of Buddy Herman Mathis for certiorari to the Court of Criminal Appeals to review and revise the judgments and decisions of that court in *Mathis v. State* [M. S. August 28, 1973], — Ala. App. —, — So. 2d —, and *Mathis v. State* [M. S. August 14, 1973], — Ala. App. —, — So. 2d —.

On preliminary examination, the writs of certiorari were issued and the causes were set down for oral argument. Upon further consideration, after having heard the oral arguments and having studied the briefs and decisions of the Court of Criminal Appeals, we are now of the opinion that the writs are due to be quashed as having been improvidently granted.

Writs of Certiorari Quashed.

Merrill, Coleman, Harwood, Bloodworth, Maddox and McCall, JJ., concur.

Faulkner and Jones, JJ., dissent.

Heflin, C.J., not sitting.

APPENDIX D

Office of
Clerk of the Supreme Court
State of Alabama
Montgomery

Re: SC 555 and SC 556
Ex Parte: Buddy Herman Mathis
Petition for Writs of Certiorari to the Court of Criminal Appeals
(Re: B. H. Mathis—Appellant; State—Appellee.
Crim. Nos. 1 Div. 139 and 1 Div. 217)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

____ Petition for Writ of Certiorari denied. No opinion.

____ Submitted on briefs

____ Appellant granted additional time to file transcript of record to and including

XX Application for rehearing overruled in SC 555 and SC 556. No opinion on rehrg.

____ Appell—granted 15 additional days to file briefs to and including

____ Appell—granted 15 additional days to file reply briefs to and including

____ Transcript filed (Notice under Rule 12)

____ Permission to file amicus curiae briefs granted

____ Permission to make additional assignments of error granted.

/s/ J. O. SENTELL
Clerk, Supreme Court of Alabama

July 11, 1974

APPENDIX E

Court of Criminal Appeals
State of Alabama
P.O. Box 351
Montgomery 36101

July 12, 1974

Honorable R. P. Denniston
Attorney at Law
P. O. Box 2125
Mobile, Alabama 36601

Re: 1st Div. 139 and 1st Div. 217
Buddy Herman Mathis, alias v. State

Dear Mr. Denniston:

The Court of Criminal Appeals has today granted a ninety day stay, in the above causes, to allow filing petition for writ of certiorari in the Supreme Court of the United States.

Please furnish this office with proof of said filing in the Supreme Court of the United States.

Yours very truly,

/s/ MOLLIE JORDAN
Clerk

CC: Binder, Lucas & Lohrmann
P. O. Box 25
Jackson, Miss. 39205

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-396

BUDDY HERMAN MATHIS,
PETITIONER

versus

STATE OF ALABAMA,
RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA AND APPENDIX

WILLIAM J. BAXLEY
Attorney General of Alabama

JOSEPH G. L. MARSTON, III
Assistant Attorney General of Alabama

COUNSEL FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-396

BUDDY HERMAN MATHIS,
PETITIONER,

versus

STATE OF ALABAMA,
RESPONDENT

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINIONS OF THE COURTS BELOW

The opinions of the Court of Criminal Appeals of Alabama affirming the Appellant's convictions are reported as follows:

Mathis v. State, 52 Ala. App. 668, 296 So. 2d 755 (1973)
Mathis v. State, 52 Ala. App. 674. 296 So. 2d 760 (1973)[1]

The Supreme Court of Alabama granted the Petitioner's petitions for writs of certiorari to review the judgments and opinions of the Court of Criminal Appeals and consolidated the cases on motion of the State, but, after reviewing the briefs and hearing oral argument on the merits, the Court quashed the writs as improvidently issued. This order was issued on May 9, 1974, and is reported as follows:
Mathis v. State, 292 Ala. ——, 296 So. 2d 764 (1974).

II

JURISDICTION

The Petitioner is seeking the writ under 28 U.S.C. 1257 (3).

III

QUESTIONS PRESENTED FOR REVIEW

A

Can there be any set standards for determining when an

---

[1]The two cases both concerned the obtaining of money by false pretenses from the Mobile County School Board, the defense was lack of **scienter** or criminal intent, the evidence and arguments on the matters at issue in this Honorable Court and in the Supreme Court of Alabama are identical and indeed the cases have been consolidated since the issuance of the writ by the Supreme Court of Alabama. Considerable confusion could result from referring to the cases by their identical styles and nearly identical citations. For this reason when it is necessary to refer to the separate cases in this brief they will be referred to according to the subject matter of the prosecution. Thus, the first case (52 Ala. App. 668, 296 So. 2d 755) will be referred to as the "Hurricane Camile Fraud Case", and the second (52 Ala. App. 674. 296 So. 2d 760) will be referred to as the "Kitchen Equipment Fraud Case".

accused should be granted a change of venue or a continuance because of pretrial media reporting?

B

Is there a distinction between the effect of media involvement in the judicial process by influencing the police, witnesses or jurors by disrupting the courtroom or by publishing evidence of a confidential nature prior to its revelation in open court, on the one hand and the effect of the reporting by the media of facts revealed by independent investigation, examination of public records and interviews with witnesses, on the other?

C

Does a state trial court have authority to limit the actions of the news media outside the courtroom?

D

Is an accused person deprived of due process of law when some of the veniremen from which his jury is selected have some knowledge of the case as a result of pretrial media reporting and have formed some vague opinions about the case, where the veniremen indicated an awareness that their knowledge is incomplete and probably inaccurate and there is no indication that the opinions are in any way fixed but are rather, vague feelings about the controversy?

E

Will this Honorable Court review findings of fact by State courts where such findings are made in good faith

and are based on and supported by the evidence.

IV

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner is making his claim under the Sixth and Fourteenth Amendments to the Constitution of the United States.

V

STATEMENT OF THE CASE

The Petitioner was indicated by the January, 1970, session of the Grand Jury of Mobile County for obtaining money by false pretenses. There were two separate indictments charging separate fraud schemes against the Mobile County School Board. At the same time numerous other persons were indicted, including Don Pennell, the Petitioner's accomplice, who was charged with the same crimes as the Petitioner, and School Board member, William B. Crane, who was charged with misconduct in office or conflict of interest.

Prior to his trials the Petitioner moved for changes of venue, continuances, and orders "protecting the Judicial Process." This latter being a judicial order limiting the media reporting about the School Board Scandal. In support of his motions the Petitioner submitted proof that there had been a considerable amount of state-wide media reporting of alleged corruption and mismanagement in the Mobile County School Board. The reporting appeared to be accurate and objective and was based on independent examination of public records, interviews, etc. There was little if any Government involvement with the media. The object

of such editorial comment as appeared in the media was the School Board. There were no calls for arrests, indictments, or convictions, although these were reported when they occurred. The Petitioner's diligent efforts to show any prejudicial effect of the media reporting fell far short of the intended goal. On the other hand, it was proven that Mobile County had a population of over 300,000 people. It was also shown that during the period which included the trials Mobile County Juries had dealt favorably with the Petitioner. A law suit by a firm of lawyers against the Petitioner ended with a verdict in his favor. And, a suit by the Mobile County School Board for the Hurricane Camile Fraud demanding $250,000.00 (the Board, according to the evidence, paid the Petitioner at least $120,000.00 for work which was neither needed nor performed) ended in a verdict against the Petitioner for only $66,863.40. Finally, it was proven that School Board member William B. Crane had been tried by a Mobile County Jury just prior to the Petitioner's trial and had been acquited. After holding thorough hearings on the Petitioner's motions, the learned trial judge overruled them.

The Petitioner went to trial on the two indictments a year and a year and a half respectively, after the first media reporting began.

In each case the learned trial judge held thorough hearings on the qualifications of the veniremen. Each venireman was examined individually and thoroughly by the defense, and the State and, where appropriate, by the court. The veniremen evidenced a strong desire to truthfully answer questions relating to their opinions and feelings about the case. This desire was motivated, at least in part, by a wish to avoid sitting on what was expected to be a long, highly

complicated, and rather boring trial during which the jury would be sequestured.[2] These examinations revealed few, if any, strong opinions toward the Petitioner.

The examinations of the veniremen revealed that most if not all of the veniremen had been exposed to media reporting. However, the examinations indicated that the veniremen's knowledge was fragmentary and the opinions based on it vague. Time and again the defense asked the veniremen questions like: "Did you read that . . . [some fact reported by the media] . . . ?" and received a negative reply.

The learned trial judge exercised great caution on behalf of the Petitioner in ruling on challenges. Any venireman evidencing a strong opinion, whether fixed or not, was removed or challenged. Challenges were sustained to any venireman who indicated that his verdict might be effected by what he had read or heard. Any venireman who was an employee of or a close relative of an employee of the School Board was removed on challenge. One venirewoman indicated that she had some information about the case as a result of her employment with the Federal Bureau of Investigation; she stated that it would not effect her verdict but that she could not specify the nature and extent of the information. A challenge to her was sustained. In spite of the trial judge's caution only eighty-four (84) veniremen were examined to produce the venire of thirty-eight (38) persons in the Hurricane Camile Fraud Case, and fifty-five (55) were examined in the Kitchen Equipment Fraud Case to produce a venire of thirty-two (32). Of course, not all those who were excused were challenged on grounds of

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[2]This perhaps also explains what Judge Cates refers to as "equivocal answers". **Mathis v. State** 52 Ala. App. 674, 677, 296 So. 2d 760.

prejudice. Many were excused because of age, health, or peculiar inconvenience.

The examinations of the veniremen consumes 322 pages (R. pp. 214-536) of the record in the Hurricane Camile Fraud Case and 277 pages (R. pp. 125-402) of the Record in the Kitchen Equipment Fraud Case.

This is neither the time nor the place for a detailed analysis of the evidence. A State Jury, trial judge, Appellate Court and Supreme Court have examined the evidence and found it sufficient. Indeed, the evidence favoring conviction was over-whelming and the defense consisted of an ascertion of lack of *scienter* in one case and of lack of criminal intent in the other. (R. pp. 214-1941 [Hurricane Camile Fraud Case] and 403-700 [Kitchen Equipment Fraud Case].

On December 18, 1970, the Petitioner was found and adjudged guilty and sentenced to seven years imprisonment[3] in the Hurricane Camile Fraud Case. (R. pp. 61-62) And, on June 25, 1971, the Petitioner was adjudged guilty and sentenced to eight years imprisonment[4] in the Kitchen Equipment Fraud Case. (R. pp. 70-71)

Appeals to the Court of Criminal Appeals of Alabama followed. The Court of Appeals thoroughly examined the record on the various issues raised, especially those relating to pre-trial media reporting and the venire. Both cases were affirmed on August 14, 1973, (i.e. the Hurricane Camile Fraud Case) and August 28, 1973, (the Kitchen Equipment

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[3]The Petitioner was admitted to bail pending appeal and is still at large on bail. On the other hand, the Petitioner's accomplice, who received sentences totaling fifteen years has served a portion of his sentences and is free on parole.

[4]Ibid.

Fraud Case). The Court noted that the media reporting was factual, truthful and not prejudicial to the Petitioner. (52 Ala. App. 668, 674 and 52 Ala. App. 674, 677) Rehearings were sought and denied in both cases. *Mathis v. State*, 52 Ala. App. 668, 296 So. 2d 755 (1973) and *Mathis v. State*, 52 Ala. App. 674, 296 So. 2d 760 (1973).

Writs of Certiorari were sought from the Supreme Court of Alabama. The writs were issued, and the Court reviewed briefs and heard oral arguments. However, on May 9, 1974, the Supreme Court quashed the writs as improvidently issued, two justices dissented but agreed that the media reporting was objective and truthful. Rehearing was denied on July 11, 1974. *Mathis v. State*, 292 Ala. ——, 296 So. 2d 764 (1974)

VI

SUMMARY OF THE ARGUMENT

This case presents the perennial problem of fair trial and free press.

It is impossible to establish set standards for the granting or denying of changes of venue and continuances on grounds of pre-trial publicity. Many things must be considered by the trial judge, especially the probable effectiveness of the proposed remedy. Charges of venue are of questionable value in cases where media interest has permeated the entire jurisdiction. *App. of Cohn*, (2nd Cir., 1964) 332 F. 2d 976; *United States v. Mitchell*, (S. D. N. Y., 1973) 372 F. Supp. 1239 Similarly, a continuance does little except delay the reckoning with the problem. In the instant case, the records showed the media reporting to be statewide in

scope. And, the Petitioner's trials took place a year and a year and a half after the media reporting began, yet according to the Petitioner these delays were not sufficient. There is no way to know how long a delay would remove all interest in the case. Ultimately the delay would have violated due process and justice. *Barker v. Wingo*, 407 U. S. 514 33 L. Ed 2d 101, 92 S. Ct. 2182 (1972) In the final analysis much discretion must be vested in the trial judge. *App. of Cohn*, (supra)

A distinction must be drawn between those cases where the media involves itself directly in the judicial process and endeavors to act as a direct influence thereon and those cases where the media merely reports the facts learned through its own independent efforts. In this case the media obtained information by examining public records, interview-individuals, and observing public events. The media did nothing that an ordinary citizen could not do. There were few if any calls for action of any sort and the reporting was uniformly factual and accurate.

A judicial order forbidding the reporting of facts by the media is a violation of the First Amendment of the Constitution of the United States. Mr. Justice Powell's opinion and order in *Times-Picayune Publishing Corp. v. Schuling-Kamp*, S. Ct. No. A-1305, 43 L. Wk. (Gen. Law.) Dicta in *Branzburg v. Hayes*, (408 U.S. 665, 33 L. Ed. 2d 626, 92 S. Ct. 2646 [1972]) possibly indicating the acceptability of such an order refers to the duty of a trial judge to regulate the courtroom and judicial officials. The trial judge's power to regulate the media is limited by the First Amendment to the courtroom and judicial officials.

It is not the having of some knowledge of the case nor

the holding of some vague feelings about the controversy which disqualifies veniremen, rather it is the holding of a strong or fixed opinion which makes a venireman unacceptable. *Reynolds v. United States*, 98 U.S. 145, 25 L. Ed. 245 (1878); *Irvin v. Dowd*, 366 U. S. 717, 6 L. Ed. 2d 751, 81 S. Ct. 1639 (1961) None of the veniremen who were accepted evidenced any strong feeling toward the Petitioner or the case.

The Petition actually seeks only the review of findings of fact made in good faith by State Court. The State Court findings are fully supported by the record and ought not be reviewed on a writ of certiorari.

VII

ARGUMENT

A

WHAT STANDARDS?

The Petitioner urges that this Honorable Court enunciate standards for the granting of motions for change of venue or continuances on the grounds of pre-trial publicity. Interestingly the Petitioner does not suggest what the standards may be. It seems to be the law that if there is any substantial publicity in a case, the accused has the right to a hearing on its effect. *Silverthorn v. United States*, (9th Cir. 1968) 400 F. 2d 627 and *Doggett v. Yeager*, (3rd Cir., 1973) 472 F. 2d 299. Of course, the Petitioner does not and cannot question the sufficiency of the hearings he was accorded on his motions in the State trial court.

However, as to the standards for the granting or deny-

ing of changes of venue or continuances, the respondent must join the Petitioner in being unable to articulate any such standards. The American Bar Associations Project on Standards for Criminal Justice, standards relating to Fair Trial and Free Press, Section 3.2 (c) reads as follows:

> "(c) Standards for granting motion.
>
> A motion for change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. This determination may based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the material involved. A showing of actual prejudice shall not be required."

Obviously this is no set standard. It places a duty on the trial judge to determine if there is a reasonable likelihood that a fair trial cannot be had. This is probably as close to a standard as can be articulated.

Each case must turn on its own special facts. The trial judge must consider many things including: (1) The size and nature of the community where the trial is to be held. In the instant case the trial was held in an urban area of some 300,000 population. (2) The accused's position in the community prior to the case. The Petitioner was a respected business man of no particular notoriety. (3) The nature of the charge. Crimes of violence are more likely to evoke fear and anger than frauds, such as those for which the

Petitioner was indicted. (4) The nature of the publicity. In the instant case even Justice Jones who dissented in the Supreme Court of Alabama commented favorably on the accuracy and objectivity of the news reports.

Probably the most important matter which the trial judge must consider is the probable effectiveness of the proposed remedy. In earlier times a change of venue to the next county or across the state would be highly effective in eliminating the effects of publicity. However, today the media disseminates information instantly throughout a whole state and indeed throughout the nation. A change of venue would be news in the place to which the case was transferred. The media there would no doubt report the transfer together with a digest of facts reported in the original venue. As Judge Gagliardi noted in denying a change of venue in the Mitchell-Stans trial:

> "Indisputably, this case will attract publicity wherever tried; the granting of an application for a change of venue merely creates the further risks of producing a cause celebre in the new venue." *United States v. Mitchell* (S.D.N.Y., 1973) 372 F. Supp. 1239, 1261.

Judge Gagliardi relied on the second circuit's decision in *Application of Cohn*, wherein Judge Moore wrote:

> "Even as the effect, if any, of publicity upon the prospective jury cannot be presently ascertained, so also is the benefit, if any, of a change of venue beclouded with uncertainty. To remove the trial of a highly publicized case (to accept petitioner's argument) to a small community outside of the City of New York would tend to focus the spotlight more

> brightly upon the case. Modern means of news communication have taken away many of the reasons for the transfer of the cause celebre which may have existed fifty years ago." App. of Cohn (2nd Cir., 1964) 332 F. 2d 976, 977.

Thus, the change of venue once justly regarded as a panacea for pre-trial publicity appears to be of doubtful value today. Rather than solve the problem, a change of venue may well only take it elsewhere.

In the instant case the Petitioner's evidence shows that the reporting of the School Board Scandal and the Petitioner's relation to it was state-wide in extent. One whole volume of the Petitioner's exhibits consisted of clippings from the Birmingham, Alabama, newspapers. Birmingham is 236 miles from Mobile. If the case attracted that much attention in Birmingham, it takes little imagination to estimate the publicity which would have attended a change of venue to that city. It is rather apparent that a change of venue in these cases would have been an exercise in futility.

A continuance, also sought by the Petitioner, presents similar problems of effectiveness. In the first place, the instant cases were tried a year and a year and a half after the media first began to report on the School Board Scandal. Yet, the Petitioner claims that this was not sufficiently long to dissipate the effect of the publicity. How long a delay would dissipate the effect? Two years? Five years?

As a change of venue tends to take the problem from one place to another, so continuance because of pre-trial publicity would tend only to prolong the problem. Each time the trial date approached the media would report the fact together with a review of earlier stories. This would tend to revive

whatever prejudice had previously existed. And, how long would it be before the accused began complaining that he was being denied a speedy trial? Thus, the continuance approach to the problem would soon tend to become in itself a violation of due process to the accused, as well as of society's right to speedy and certain justice. See *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972)

Another, remedy sought by the Petitioner was an order limiting the reporting of the matter by the media. As will be discussed below such an order would no doubt have been both ineffective and unconstitutional.

Another remedy, not sought by the Petitioner, but which should be given some consideration because of the certainty of its application and its obvious effectiveness is suggested by Section 3.3 of the Standards Relating to Fair Trial and Free Press of the American Bar Association's Project on Standards for Criminal Justice. This is a waiver of trial by jury by the accused. There would be no doubt as to when such a remedy would apply; it would apply whenever the accused asked for it. And, the effectiveness of such a remedy is obvious. However, in the instant case the Petitioner never indicated an interest in waiving trial by jury.

From what has been written it seems obvious that there are no set standards for the granting or denying of motions for changes of venue or continuances because of pre-trial publicity. Much discretion must be placed in the trial judge. *Application of Cohn* (2nd Cir. 1964) 332 F. 2d 976. And, it is obvious that the learned trial judge in this case acted well within his discretion.

B

MEDIA INVOLVEMENT IN THE JUDICIAL PROCESS VS. MERE REPORTING

Logically, the mere existance of pre-trial media reporting cannot in itself work a denial of due process. Rather it is the effect of the publicity in creating bias which causes the possible denial of due process. Yet, this Honorable Court has in several cases indicated that under certain circumstances it is unnecessary to show the effect of the publicity. These cases include *Rideau v. Louisiana*, (373 U.S. 723, 10 L. Ed. 2d 663, 83 S. Ct. 1417 [1963]; *Estes v. Texas*, (381 U.S. 582, 14 L. Ed. 2d 543, 85 S. Ct. 1628 [1965]), and *Sheppard v. Maxwell*, 384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966), all cited by the Petitioner. Each of these cases, however, involved more than the mere reporting by the media; they each involved efforts by the media to involve itself directly in the judicial process.

The respondent respectfully submits that if this Honorable Court held that it was unnecessary in these cases to show the effect of the media activities, it was because the effect was immediately apparent. It was not mere reporting of facts by the media that was condemned in these cases, but the direct involvement of the media in the judicial process. A newspaper can no more deprive a person of due process than a steel mill or a service station can. It is Government and government officials who must grant and may deny due process. In each of the three cases cited above it is the actions or omissions of government officials that lie at the basis of the reversal. That is, the sheriff's participation in the interview in *Rideau*, the trial court's allowing the television camera into the courtroom in *Estes* and the whole

criminal justice system gleefully joining in the media witch hunt in *Sheppard*. The respondent respectfully submits that where the media only reports facts developed by its own investigation, examination of public records, and observations of public events and in no wise involves itself in or attempts to influence the judicial system, then the effect of the publicity must be shown before a denial of due process can be claimed.

In the instant case the media's activities were all independent of the judicial system. To obtain its information the media did nothing that any citizen could not do. The media presented few if any calls for action of any sort. The reports were uniformly factual and accurate. The victim of the Petitioner's crime, i.e. the School Board, was more the object of media concern than the Petitioner. The Petitioner's diligent efforts to show that the media reporting had created strong prejudice against him in Mobile County failed utterly. Since the diligence of Petitioner's counsel is above reproach, it must be assumed that such failure was due to the lack of prejudice in the community against the Petitioner.

C

A STATE COURT MAY NOT REGULATE MEDIA OUTSIDE THE COURTROOM

In the State trial and appellate courts and here the Petitioner has claimed that the learned trial judge should have issued an order "protecting the judicial process". The Petitioner moved for such an order in each case. (R. pp. 19-22 in both cases) Apparently, the trial judge ruled on neither motion. This was no doubt an oversight. The Petitioner filed a veritable blizzard of motions in the trial court and hearings were held on most of them. Apparently, the Pe-

titioner never called these particular motions to the trial judge's attention. Since there was no ruling on these motions it would appear that they present nothing for review.

However, since the apparent object of the motions was the suppression of the news media, it is obvious that the orders should have been denied.

In the first place such an order would be utterly ineffective. The media would have only switch from straight reporting to the publishing of inuendos. And, even if the media fully complied with the letter and spirit of such an order, which is unlikely, the community would soon turn to rumors and gossip to fill the vacuum created by the order. It would be impossible to identify such rumors or to measure their effect. And, rumors would appear to be more harmful to the process than factual reporting.

A more important matter is the fact that such an order would have been repugnant to the Constitution of the United States. It is difficult to imagine what the First Amendment protects if it does not protect the dissemination of news of public affairs. Recently in a criminal prosecution which occasioned considerable media coverage, a Louisiana trial judge issued an order limiting media reporting in the case. One newspaper brought the matter to the attention of the Federal Courts. The District Court and a panel of the United States Court of Appea'ls for the Fifth Circuit refused to relieve the newspaper of the order. However, Mr. Justice Powell of this Honorable Court, sitting as a Circuit Justice for the Fifth Circuit, issued a stay of the State Court order *pendente lite* on July 29, 1974. *Times-Picayune Publishing Corp. v. Schulingkamp*, S. Ct. No. A-1305, 43 L. Wk. (Gen. Law) 2046 Mr. Justice Powell in issuing the stay order

indicated a strong belief that the order was in violation of the First Amendment.

Admittedly, there appears certain dicta in *Branzburg v. Hayes*, (408 U.S. 665, 685, 33 L. Ed. 2d 626, 641, 92 S. Ct. 2646 [1972]) which could be construed as permitting such orders. However, this language was addressed to the proposition that the First Amendment grants no special privileges to the media beyond those held by others, and that, therefore, a trial court could control reporters in the courtroom as it controls others. This conclusion is strengthened by Mr. Justice White's quotation from *Sheppard v. Maxwell*[5] which immediately follows the language. The language quoted from *Sheppard* relates to the failure of the trial court to control the media representatives *in the courtroom* and the court officials and police in giving information to the press. It is obvious that a court may and must control the courtroom and the activities of court officials. But, the First Amendment forbids the extension of this authority to the activities of private persons and institutions outside of the courtroom.

In the instant case, the activities of the media were independent of the judicial officials. Leaks were hardly necessary to the media, the entire case centered on public records. There was no search and seizure, confession, or confidential police investigation. Indeed the record indicates that there was no police investigation at all. There is no indication of any impropriety by the media within the courtroom or out. It must be remembered that the three courts which have examined this case thus far, including the dissenters in the Supreme Court of Alabama, have had only favorable comments on the media's performance in this case.

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[5]384 U.S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966).

D

THE VENIREMEN EVIDENCED NO FIXED OPINIONS

In his dissenting opinion in the Supreme Court of Alabama Mr. Justice Jones quotes a portion of the testimony of Venireman Luther James, Jr. *Mathis v. State*, 292 Ala. ——, 296 So. 2d 764, 769 (1974). The choice of James is fortunate for several reasons. First, he was typical of the veniremen in both trials. His testimony, like the others shows some knowledge of the School Board Scandal. He knew that the case involved fraud, although this knowledge seemed to come primarily from the trial court's reading of the indictment. (R. p. 299) But, his knowledge was fragmentary; he did not know, for example, until he was informed by defense counsel, that the Petitioner was charged with the same crimes for which Don Pennell had been convicted. (R. p. 291) He evidences no strong feelings about the case. Because, Mr. Justice Jones mentions James' testimony in his dissent and because it is so typical of the others, the Respondent State submits the entire examination of Luther James, Jr., as appendix "A" to this brief.[6]

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[6]This examination should prove helpful to this Honorable Court in other ways. Its length and thoroughness demonstrates the exhaustive nature of the examinations allowed by the trial judge. Mr. James' cander demonstrates the universal honesty of the veniremen. The examination contains as an exhibit one of the newspaper articles which the Petitioner finds so offensive; this Honorable Court can judge the article for itself. Finally, it will be noted that the learned trial judge first overruled a defense challenge to Mr. James (R. p. 298), then tentatively sustained a defense challenge (R. p. 300) and finally overruled the challenge (R. p. 301). Thus, Mr. James' is a border line case and as such provides a valuable insight into the unarticulated standards which Judge Bolling used in ruling on challenges.

The Petitioner complains that many of the veniremen in these cases knew something about the case. He suggest that putting him to trial before such a venire was a denial of due process. This is not the law, nor has it ever been the law. Two hundred years ago Chief Justice John Marshall sitting as a circuit judge on the trial of Arron Burr observed:

> "[L]ight impressions, which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, *constitute no sufficient objection to a juror;* but those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him." Quoted with approval in *Reynolds v. United States*, 98 U.S. 145, 155, 25 L. Ed. 245, 246 (1878) (Emphasis supplied)

The necessity of accepting veniremen who have some knowledge of a case has increased over the years rather than decreased. As Mr. Justice Clark observed in *Irvin v. Dowd*, 366 U.S. 717, 722-723, 6 L. Ed. 2d 751, 756, 81 S. Ct. 1639 (1961). It is not the knowledge of some of the facts nor the holding of some slight opinion which disqualifies a venireman. Indeed, the fact that the accused was indicted may cause some adverse opinions. Rather, it is holding of a fixed opinion which disqualifies a venireman.

Consider the examination of Luther James, Jr., Appendix "A". Does this examination reveal a hint of a fixed or even strong opinion? The Petitioner objected to Mr. James because the man honestly admitted that he could not swear that there was no possibility that what he had heard

about the case would effect him *subconsciously* during the trial. This, says the Petitioner (and Mr. Justice Jones agreed) was sufficient to challenge him for cause. Now, who can honestly swear what subconscious influences are presently acting on him, to say nothing about future possibilities? Yet, the learned trial judge indicated a willingness to sustain a challenge to Mr. James at least at one point. Of course, the Petitioner argues that a change of venue should have been granted him. But, as pointed out above, it is doubtful that a change of venue would have been of much help.

In the final analysis, while the veniremen in those cases indicated some fragmentary knowledge of the School Board Scandal, there was no indication of any strong feelings among those selected and certainly no fixed opinion.

E

THE PETITIONER URGES THIS HONORABLE COURT TO REVIEW FINDINGS OF FACT

As the Petitioner recognizes, his Petition seeks only the review of findings of facts. He argues that this should not deter this Honorable Court. The Petitioner asserts that this Honorable Court has on occasions in the past reviewed findings of fact by state courts.

It is obvious that the Alabama Courts in this case applied the law as announced by this Honorable Court. The cases cited by the Petitioner all involve situations where State Courts gave lip service to the constitution and made findings utterly unsupported by the evidence, indeed findings that flew in the face of the evidence. Eg. *Norris v. Alabama*, 294 U.S. 587, 79 L. Ed. 1075 (1934) This is simply not the

case here. Mr. Justice Jones cites a portion of the examination of Luther James, Jr., as proof that the media reporting in this case created prejudices toward the Petitioner. The transcript of Mr. James' testimony is presented this Honorable Court as Appendix "A" to this brief. The Respondent state respectfully submits that an examination of this transcript will reveal no strong feelings about the case and certainly no fixed opinion. The media reporting was reviewed by the State courts and universally found to be objective in nature. Even the dissenters in the Supreme Court of Alabama agreed with the Court of Criminal Appeals finding that "the reporting was more or less objective". *Mathis v. State*, 292 Ala. ——, 296 So. 2d 764, 769.

What this case presents then is findings of fact based squarely on the evidence. Such good faith findings of fact ought not be reviewed by this Honorable Court on a writ of certiorari.

VIII

CONCLUSION

The Petitioner urges the issuance of the writ, asserting that this case provides this Honorable Court with the opportunity to establish standards for the granting and denying of changes of venue and continuances because of pre-trial publicity. Yet, the Petitioner suggests no such standards, and it is impossible to define any set standards. Rather, this matter must be decided on a case by case basis. For this reason broad discretion must be vested in the trial judge. The learned trial judge in this case exercised his discretion with great caution and in a manner favorable to the Petitioner. The state appellate courts reviewed the record and universally agreed that the media reporting was "in no wise"

prejudicial to the Petitioner. The State of Alabama respectfully submits that the Petition seeks nothing except a further review of findings of fact. And, the state of Alabama, therefore, respectfully prays that the writ be denied.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General

JOSEPH G. L. MARSTON, III
Assistant Attorney General

APPENDIX A

THE EXAMINATION OF
LUTHER JAMES, JR., VENIREMAN
RECORD PAGES 289-309
(HURRICANE CAMILLE FRAUD CASE)

Messrs. Binder and Deniston for the defense

Messrs. Booth and Loveless for the State

* * * * * *

THEREUPON:

LUTHER JAMES, JR.

was called as a witness, and having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and

(290)

testified as follows:

EXAMINATION BY MR. BINDER:

Q Mr. James, would you tell His Honor where you are employed?

A International Paper.

Q What is your occupation there?

A Electrician.

Q Do you recall this Mathis story and all the articles that have, at various and sundry times, been composed in the Mobile Press Register since a year ago, headlines, occasional stories? You were aware that there is a so-called alleged scandal in the School Board, you have seen that?

A Yes, sir.

Q And you have been exposed to it on the T.V. haven't you?

A Yes, sir.

Q And you have been exposed to it on the radio, haven't you?

A Yes, sir.

Q I heard a radio broadcast this morning about this case. You have heard similar broadcasts about the facts of the case, haven't you?

A Yes, sir.

Q Now, I appreciate your being so honest and candid with me and I would like to go into this: Sometime back, there was a trial in this county regarding a man named Don Pennell. Do you recall that big trial?

A Yes, sir.

Q And do you recall reading in your newspaper the accounting of the trial as it came down every day in the headlines?

A Yes, sir.

(291)

Q And do you recall that Mr. Pennell was convicted?

A Yes, sir.

Q And do you recall that he was incarcerated in a prison in Alabama?

A Yes, sir.

Q And you have been reminded time and time again, have you not, sir, that Mr. Mathis is charged with the same crime? You would say to me, would you, that along with the Pennell case each day, as the Reporting came forward, Mr. Mathis' name was prominently mentioned, was it not?

A Yes, sir; I didn't know it was the same charge.

Q But, I am telling you today it is the same charge and I want you to know that. From what you have said you know some of the facts of the Pennell case, do you not? You have read it?

A Yes; I have read it.

Q And the truth of the matter is that you don't remember every detail of those facts today, do you?

A No, sir.

Q But, you read them at one time?

A Right.

Q And this morning in the December 7 issue of the newspaper on the front page of it?

MR. DENNISTON: December 8th.

MR. BINDER: Excuse me, well I am in the wrong pew, December 8th paper, on the December 8th paper, you read here on the front page where the ten possible jurors were selected for the trial.

THE WITNESS: I believe I read that in last night's paper.

BY MR. BINDER:

Q All right sir, and this morning you told me before that you had read the paper this morning, is that true?

A I had read a paper I should have said, I don't know

(292)

whether it was this morning or last night.

Q Let me show you some of the pages of the December 8th paper?

A I did not read that; no, sir.

Q But, you did read the article, "Ten possible Jurors selected for trial"?

A Yes,

Q Now, you knew that you were one, and I would like to introduce this into evidence as soon as we cut it out?

THE COURT: Mark it in, Mr. Reporter.

(Thereupon the Court Reporter marked Defendant's Exhibit No. 1 into evidence.)

MR. BINDER: Your Honor, since this has been offered into evidence, I am not sure what sort of lettering or numbering system we will have, but some procedure is going to have to be worked out to keep these things straight.

THE COURT: The Reporter will take care of that.

BY MR. BINDER:

Q Now Mr. James, you have also read these articles as they have come down that show that Mr. Mathis is charged with other matters, have you not?

A I don't recall.

Q You don't recall?

A No, sir.

Q I ask you whether or you you have any children in school?

A Yes, sir.

Q How many, please, sir?

A Three.

Q And what schools are they in?

A Forest Hill and Shaw High School, Forest Hill [cont. p. 296]

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* * * * * *

DEFENDANT'S EXHIBIT NUMBER ONE

FOR

JURY QUALIFICATION

* * * * * *

MOBILE REGISTER

MOBILE, ALABAMA TUESDAY MORNING,

DECEMBER 8, 1970

* * * * * *

OF B.H. MATHIS

10 POSSIBLE JURORS SELECTED FOR TRIAL

By Bill Sellers, Register Staff Reporter

Only 10 prospective jurors were qualified Monday following a penetrating examination of an 84-member venire

called for the false pretense trial of contractor B. H. (Bud) Mathis in Mobile Circuit Court.

Three of the jurors were successfully challenged by the defense during the first round of an intense jury qualification process which is to continue Tuesday — and possibly longer.

Judge William D. Bolling, in an unusual move for Mobile, has agreed to allow the State and defense to examine prospective jurors in panels of 12 and even individually in order to determine if any prejudices or other disqualifying factors exist.

Only the first of seven panels had been examined when the overnight recess was called shortly before 6 p.m. Monday. Two jurors on the first panel had been dismissed due to possibly prejudicial knowledge of the case and a third juror had been dismissed in general questioning of the entire venire earlier on grounds of his age, it being 66.

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When Bolling called the recess, defense attorneys filed a motion for a mistrial on grounds that those jurors who had not been closely examined had not been instructed by the Court to avoid reading or listening to news accounts of the Mathis trial.

Another ground for mistrial cited by the defense was the lack of a guideline order from Bolling concerning news media coverage of the trial.

The defense has repeatedly asked that some coverage guidelines be established by the Court and Bolling had indicated he might issue some news media instructions on this point.

However, no guidelines had been set by the Court Monday afternoon.

Bolling denied the mistrial motion and called for exami-

nation of the second panel of jurors to begin at 9 a.m. Tuesday.

After all 84 prospective jurors have been examined and qualified, with many more expected to be dismissed from further service in the Mathis case during the process, an unannounced number of those remaining will then be struck by state and defense in order to arrive at the trial jury.

Bolling said Monday that two alternates will serve along with the regular 12 jurors in what is expected to be a marathon trial of Mathis on a charge of obtaining some $102,000 in school funds through false pretense.

The charge stems from a cost-plus contract Mathis had with the Mobile County School Board in 1969 for repair of schools damaged by Hurricane Camille.

A total of 247 witnesses have been subpoenaed in the case,

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142 by the state and 105 by the defense.

Three principal state witnesses failed to respond to a lengthy roll-call of witnesses Monday and Bolling granted a state motion to issue instant subpoenaes for subcontractors M. E. Orso, Markward Reynolds and C. G. Pierre.

During the jury qualification process, which began in mid-afternoon after court officials had been in recess Monday morning to attend the funeral of Asst. District Atty. Sydney Pfleger, the defense concentrated on determining the extent of prospective jurors' knowledge of the facts in the Mathis case.

Bolling allowed virtually unlimited questioning on knowledge of the case, possible prejudice, acquaintance with any witnesses or principals as the defense in particular moved toward a goal of finding "a juror free from taint."

But Bolling blocked defense questions concerning possibly hardships arising from the likely length of the trial. He

said such matters were strictly within the realm of the court's discretion.

* * * * * *

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elementary and Shaw High School.

Q And I ask you whether or not your wife is a member of the P.T.A. of those schools?

A Yes, sir.

Q And are you?

A Yes, sir.

Q And is it true that both of you go to the P. T. A. meetings?

A Occasionally.

Q I ask you whether or not you have heard the facts of this case and the matters that could come up in this trial discussed at the P.T.A. meetings when this thing first broke loose in the County? Isn't it true that it was discussed?

A I wasn't there.

Q Have you or your wife ever talked to one another about this matter?

A Yes, sir.

Q And would I be fair in saying to you that as parents of children you were concerned about the situation and as taxpayers of this county?

A Yes, sir.

Q And particularly you were concerned because your trade is that of a similar business in the contracting field, you are an electrician and you have been in the business, I am sure, a number of years, haven't you?

A Fifteen.

Q And the fact that it involves contractors and subcontractors, electricians and plumbers and what have you, would make it of even more interest to you, would it not?

A Possibly.

Q Now, do you belong to a union?

A Yes, sir.

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Q And it is the IBEW?

A Yes, sir.

Q You work under an IBEW contract at International Paper?

A Yes, sir.

Q And is this a current contract or has it just been renewed or is it about to go about?

A It is current, 1970.

Q And goes through 1970?

A Started 1970.

Q So, you are in no dispute with your employer at all?

A No, sir.

Q Now, I am concerned as Counsel for Mr. Mathis, Mr. James, with the fact that you know some of the facts of this case, and I want to explain my next question to you and I am saying this to you with all due sincerity. I am concerned with the fact that if you were selected as a juror in this case, that perhaps in the next two or three days you might be sitting here as a Juror and something might come from the witness stand that might correlate in your mind and in your subconscious mind some of those facts you previously read about in this case. That is what I am concerned about.

Now, I am concerned, and I ask you: You can't assure this Court, can you, that if you sat on this Jury and something was said from the stand there that you previously read about in the headlines, that it wouldn't strike a bell and influence you in some manner, you can't promise us that, can you?

A Honestly, I probably couldn't, subsconsciously, it would probably have an effect, subconsciously.

Q And when you promised and when you swear, you are

telling this Court and me that you are going to try to do the best you can in an unbiased fashion, aren't you?

A Yes, sir.

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Q But, you can't tell me beyond a doubt that something you might hear in this case in some fashion might correlate with something you have talked with your wife about or something you have said or read in the paper, that is about the truth of it. isn't it?

A Yes, sir.

MR. BINDER: We ask that the witness be excused, Your Honor.

THE COURT: Do you have any questions, Mr. Loveless?

MR. LOVELESS: I don't think he has gone far enough yet on grounds for cause. We are talking about terms of might and subconsciously.

MR. BINDER: These terms might be unknowledgeable to this District Attorney, but if he would read the cases, he would know what I am talking about. I feel that the witness has been truthful, Your Honor.

MR. LOVELESS: But, something that might effect his subconscious.

THE COURT: As to his not being able to guarantee that something might happen, I am going to overrule your challenge.

MR. BINDER: To which the defense excepts.

BY MR. BINDER:

Q Now, how many articles would you submit, Mr. James that you read about this case, could you even estimate it? Would you say there were more than a hundred or two hundred that came forth in the past year?

A I wouldn't estimate.

Q If I told you that we have seven volumes of news-

paper articles up here, would you tell me that possibly that was true, you wouldn't deny it, would you?

A I couldn't deny it.

Q And would you tell me that, as you have in the past

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on the stand, that you read a considerable amount of these articles?

A Yes, sir.

Q Would you tell me what you think Mr. Mathis is charged with?

A Fraud.

Q Fraud?

A Yes, sir.

Q And would you tell me, do you know anything else that is involved?

A No, sir.

Q And would you tell His Honor what does that fraud consist of as you have understood it from the newspaper, what facts?

A From what His Honor read yesterday, the only reports — or this morning rather — he was charging for work not being done.

Q And isn't that what the newspaper told you, too?

A Yes, sir.

Q And didn't you read it?

A Oh, yes.

Q And didn't you read various and sundry subcontractors' testimony in the newspaper about what they had done?

A Right.

Q And you have said to the Court and you can't tell us that may not have an effect on you, you can't say that, can you?

A No, sir.

Q In other words, you are going to do your best, if you are chosen as a Juror, to be impartial and you swear to tell the truth, but you don't mean to imply that when you read or when you heard some of the testimony from someone and you had heard some testimony or read some testimony before about that in the Pennell

(300)

trial, you are not telling us that wouldn't have an effect on you? Isn't that what you are saying?

A Let's put it this way: I will be honest with you. there is a possibility.

Q I want to thank you for being honest about it. You are trying to answer my questions truthfully and you have now told this Judge that there is a possibility that your knowledge would have an effect on you if you were a Juror, wouldn't it?

A Yes, sir.

MR. BINDER: Now, Your Honor, what do I have to do?

THE COURT: I think I am going to sustain the challenge.

MR. LOVELESS: Your Honor, I don't believe that possibility is sufficient under our law. That is all he has developed in that there is a possibility. There is a possibility that the world is going to come to an end tomorrow, but it is just not sufficient. On a possibility, we are not going to get any Jurors in Mobile County.

THE COURT: I think anything is possible. I think that is possible that the witness may dream of the case tonight and might have a dream containing some facts that would possibly influence his verdict. I am going to stick to my procedure and I am going to ask him under oath. . .

MR. BINDER: You just sustained my challenge. Are you going to take it back?

THE COURT: I didn't rule firmly, I denied your challenge a minute ago and I was tentatively sustaining it. The District Attorney has pulled me back. I am going to ask this witness under oath to answer yes or no to this question: In your best judgment, would you be influenced in arriving at a verdict in this case by matters that you have read in the paper?

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THE WITNESS: No, sir.

THE COURT: In your best judgment, would you be influenced in this case by anything you have heard outside of this Courtroom?

THE WITNESS: No sir.

THE COURT: I am going to deny the challenge.

BY MR. BINDER:

Q Now Mr. James, I know that you answered those questions truthfully, but what the Judge didn't ask you and I asked you once, and what you have sworn to twice heretofore was this: I asked you whether the articles that you have read about the witnesses in the Pennell trial, if brought to your recollection from the stand, would have an influence on you and you testified that there was a possibility to that. Now, I didn't ask you, like the District Attorney was talking about a minute ago, of whether or not you may have heard that the world would come to an end and the Judge said, well you may have a dream at night about it. I asked you and you answered affirmatively, the truth, that the matters you have read in the newspaper regarding the Pennell case, and the things that happened thereafter, if those same witnesses came in this trial, you have told me that there is a possibility that that might have an influence on you, haven't

you? That is what you have told me on two previous occasions and you are trying to tell me the truth and I believe you. Now, isn't that your testimony?

A Well, you stated that if something came up in this trial later on. . .

Q Yes; later on.

A That would refer my memory back to something I read a year ago, that was my impression that I would recall that.

Q That is right, and you told me that it might influence you in some manner in this trial as a Juror?

A Well, let me back up there?

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Q Yes.

A I don't believe that it would actually influence my opinion.

Q You would try not to let it bother you?

A right.

Q But, you can't assure me absolutely that you would remain a fair and impartial Juror with all the facts that have been presented to you?

A Could anybody?

Q Well, I am asking you the questions. Now, I want to, I will rephrase it this way and I want to explain to you something: I have, as the defense counsel, no objection to you as a person, I have never seen you before in my life, but the law, I want you to understand this as a witness and then I want to ask you a question, the law provides for Mr. Mathis a Juror who is free from knowledge of the case and you have testified you have some definite knowledge about the case. This, the law gives me the right to ask you whether or not this knowledge might effect you, if your memory was recalled and you favored me with the truth that if some

evidence came from the witness stand and you happened to be selected as a Juror, you don't know whether that evidence from the stand would effect you or not, really, do you, you can't tell because you have been exposed to so much of this case, wouldn't you say?

A Well, I would say that I would use my utmost judgment.

Q Do the best you can?

A Right.

Q Allright, and I believe that you would. I believe you are a man of your word, but you can't give me that absolute assurance of impartiality because you know too many facts about the case, don't you? In short, wouldn't you feel a little uncomfortable with the rest of the Jurors since you do know so much about it?

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A I don't know whether I know any of the facts reading newspaper accounts aren't facts as such.

Q And you don't think they have had any impression on you and your wife and all the talking you have done about this case?

A Well, there has been talk and everybody has an opinion.

Q They do?

A Well, sure they do.

Q What is your opinion?

A I don't think it should be expressed.

Q I think it should be. Let me get something straight, we are talking to you. . .

THE COURT: If you have an opinion, I think you should tell that opinion.

THE WITNESS: I don't have an opinion as to guilty or anything.

BY MR. BINDER:

Q What is your opinion, before the Judge asked you to. . .

A I think it was a bad thing for something like this to even come up to start with for anybody, regardless of what it was for on the School Board or what have you.

Q And wouldn't you agree as a citizen of this community that it was a sorry day in Mobile when you heard about all this and it had an effect on you, didn't it?

A Sure it was.

Q And you have never seen so much publicity in all your life in anything in this city or Mobile, have you?

A Possibly not.

Q I have been told that, I don't know. And you have never seen any other matters receive so much attention, twelve months worth as this has? Let the Record show that he nooded his head in

(304)

assent. Before you were served as a Juror, you felt that it was a sorry mess, a bad situation, didn't you?

A Oh, yes.

Q And as you read all this testimony that came through the newspaper with little children, and I have got some, you were particularly interested, weren't you?

A Sure.

Q And you and your wife got an opinion, don't you. You had that opinion before you got in the Jury Box?

A Let me state this, Mr. Binder.

Q Yes.

A. I said I used the word, "Opinion" loosely, not really, I didn't really have an opinion as to the man's guilty or innocence. Let's make that clear.

Q You had an opinion though, as to all the facts surrounding the matter, the elected fraud?

A Well. . .

Q Would you go with me that far?

A I don't quite. . .

Q You had an opinion as to the entire situation and . . .

A The opinion was this, it was a big mess.

Q And wasn't that. . .

A That was what I was getting at a while ago as far as opinion.

Q Now, as the facts came down to you in the Pennell case and you read daily the witnesses statement and you found that a Jury in this county convicted Pennell and, if you will sent him to prison, didn't that opinion of the entire situation sort of fix in your mind then as to the rest of the defendants in this so-called mess? Aren't you a normal, reasonable man and when you saw that happen, what effect did that have on you, what did you feel then?

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A Well, I, it is true I wondered how it would effect the other people, the other defendants.

Q And you wondered, yourself, how it would effect the other defendants and at that time you hadn't even been selected as a proposed Juror, had you?

A No, sir

Q When were you served with process in the case as a proposed Juror?

A Possibly two weeks ago.

Q Now, during the last two weeks, did you read the newspaper articles concerning Mathis?

A To my knowledge, I only read one that come up with the trial was coming up.

the School Board scandals or mess?

A Yes, sir.

Q And do you remember their names?

A There was a Mr. Crane, Mr. Smith and Mr. Pennell that I recall.

Q Mr. Crane, Mr. Smith and Mr. Pennell?

A Yes, sir.

Q And you remember that because you read the newspapers, didn't you?

A Yes, sir.

Q And do you know where those men work or are employed of anything? You don't know?

A No, sir; Mr. Pennell was with the School Board, I think, I don't know.

Q Now, you were served as a Juror about two weeks ago and I am going to show you a headline of your newspaper here December 2 and ask you whether or not you have ever seen this headline, "Judge Bolling rules against Mathis venue change"? Have you

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ever seen that?

A I don't recall that.

Q This is a Wednesday headline. You don't recall that?

A No, sir.

Q All right, sir, Mr. James, how many things has Mr. Mathis been involved in that you know about that you have heard about?

A That I know about?

Q Or have heard about, read about?

A I only, the only one I think I know anything about is a contractor, is that what you are talking about, a contractor?

Q Yes.

A A contractor.

Q Do you remember reading headlines where Mr. Mathis

Q Did you know that there were other men involved in has been sued in any civil suits, big headlines about a bank?

A I don't remember the details.

Q But, you remember hearing about it or seeing it?

A Yes, sir.

Q Did you say yes to that?

A Yes, sir.

Q All right now, do you take any interest in politics, Mr. James?

A Very little.

Q Do you recall that there was a political campaign in this country?

A Yes, sir.

Q And it was just over with not too long ago, wasn't it?

A Yes.

Q Do you recall seeing any paid-for political ads very large in number, by two attorneys running for office, one against the other, using Mathis' name in those articles like they didn't know

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of him, didn't represent him, didn't have anything else to do with him? I cite you one as Mr. Marr, a lawyer here in the City, do you remember those ads?

A No, sir.

Q You didn't see them?

A I don't remember.

Q Do you remember seeing them and not reading what was in them?

A No, sir.

Q All right, do you remember any articles regarding Mr. Mathis in the newspaper this past year whatsoever that didn't have anything to do with this case, just talking about him? Do you remember seeing any at all?

A Yes, sir.

Q What I am talking about . . .

A That he is a Democratic . . .

Q Nominee?

A Nominee for something.

Q You read all that stuff?

A I remember he was running for office, I can't remember the exact office right now.

Q And you remember what happened to him in the newspaper?

A No, sir.

Q But, you read all that stuff?

A I read some of it.

Q And you can't assure me, can you, whether the intent exposure that you have had to all this publicity won't affect you somewhere along down the line in this trial? I will give it to you another way, I will withdraw that question. Mr. James, have you, if you were Mr. Mathis, if you were him and you knew as much about this case and you knew as much as you know, would you want

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Mr. Mathis to sit on this Jury?

A If he has the integrity I do, I wouldn't mind it.

Q You have integrity?

A I would say this: I would give him an honest opinion of what is put on the table.

Q But, you can't assure me, you don't know what is in your subconscious mind, do you? See, the issue here, Mr. James, is how much do you know about this case and the issue is that this man is entitled to people to judge him that are free from any prejudice, that are free of the knowledge of the case and we are trying to find twelve good men and true in this County that haven't read all this stuff and couldn't have had any effect on them. Can you tell me, with what all you know, having small children, having discussed it with your

wife, having said everything that you have said today, that you can assure me that the facts won't have an effect on you in all fairness?

A No, sir; I don't believe the facts would have any effect, I don't believe they would.

MR. BINDER: We say, under the rule, that we have met the test, under the law, for challenge every step of the way and we call upon the Court now to challenge.

THE COURT: Motion denied. Do you have any questions, Mr. Loveless?

* * * * * *

EXAMINATION BY MR. LOVELESS:

Q You said earlier in your testimony that, of course, the effect of this thing disturbed you. Was it that such a thing could happen, was that disturbing to you, or was it the fact that it was brought to light?

A Well, that it would happen.

MR LOVELESS: That it would happen. No further questions.

(309)

THE COURT: All right Mr. James, when you go back into the Jury Room, do not discuss anything about what you said or anything about the case, just talk about football and anything you want to, but not about this case here.

THE WITNESS: All right, sir.

* * * * * * * * * * *

CERTIFICATE OF SERVICE

I, Joseph G. L. Marfston, III, Assistant Attorney General, one of the attorneys for the State of Alabama, Respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on this ___ day of November, 1974, I did serve the requisite number of copies of the foregoing Brief and Argument and Appendix on each of the Attorneys for the Petitioner, by mailing the same to them, first class postage prepaid, and addressed to them as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-396

BUDDY HERMAN MATHIS,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

PETITION FOR REHEARING

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-396

BUDDY HERMAN MATHIS,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the Petition for Writ of Certiorari entered on January 13, 1975, and (2) granting the Petition for Rehearing.

Petitioner would show two grounds for this motion and proceeds under the rule allowing Petitioner to urge rehearing on substantial grounds available to this Petitioner heretofore although not previously presented or argued as follows, to wit:

(1) The guideline mandate wherein this Court has held that the bench has a responsibility to guard against prejudicial pretrial publicity as enunciated in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), is not practical nor is it effective because of a direct conflict with the First Amendment.

(2) The granting of a long continuance (the hiatus period for "cooling off") is not effective nor practical because in effect this type procedure is in direct conflict with the accused's rights under the Sixth Amendment to a speedy trial.

The consolidated records in these two cases collectively present to this Court without fear of contradiction a well documented history of the struggle of an accused in a rural area to obtain some type of relief which would allow him to be tried in a forum free of prejudice. Each record contains over 800 newspaper articles and support for the accused is enhanced by thorough documentation of additional radio and television media publications addressed to Mobile County together with oral testimony supporting this accused's position.

The Court has seen fit not to grant certiorari. We pray that this Court in its wisdom reverse its ruling and take notice of these two grounds above which have not been urged heretofore. The Attorney General of the State of Alabama himself recognizes that long continuances do not abate voluminous prejudicial pre-trial publicity and each reporting revives with crescendo previously existing prejudice and this approach to the problem violates due process to the accused. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

The cases since *Sheppard v. Maxwell*, supra, reveal that many attempts by the courts to guard or prohibit publicity media releases are simply not upheld or sanctioned by appellate tribunals. Guideline orders and/or "gag orders" are simply not popular with appellate tribunals who feel that such mandates are in conflict with the First Amendment. The problems presented here desperately need examining by this Court. *Sheppard v. Maxwell*, supra, has little meaning to an accused if appellate tribunals will not approve lower courts' use of such orders over the press. Although *Sheppard* mandates the use of a guideline order under a similar set of facts as presented in *Sheppard*, the lower court in the case at bar, with utter dis-

regard of the pleading of the accused seeking a guideline order, failed to even rule on the timely motion placed before the court by Petitioner.

Most of the authorities previously cited, subsequent to *Sheppard*, hold that *Sheppard* is the classic case in our jurisprudence which requires that under certain circumstances the bench has the responsibility to protect the accused and issue the guideline order. We here are faced with the problem that lower courts do not adhere to *Sheppard* on this point and when attempts are made by the courts to prohibit the reporting of testimony or the publishing of names of witnesses or the reporting of verbatim testimony, these orders are thereafter struck down. See *State v. Sperry*, 483 P.2d 608 (Wash. 1971); *Johnson v. Simpson*, 433 SW2d 644 (Ky. 1968); *New York Times v. U. S.*, 403 U.S. 713, 29 L.Ed.2d 822, 91 S.Ct. 2140 at page 714 (1971).

In *New York Times*, the dicta was to the effect that courts which allow such orders reflect that they are attempting to increase their powers unnecessarily and thus would lose respect which makes their court orders effective. The *Sheppard* decision ruled that prejudicial pre-trial publicity had saturated the community and thus a fair trial had been denied. We read this decision and we are constrained to believe that the lower court judge was remiss in not issuing a protective guideline order.

Justice Clark, who is now retired from this Court, has indicated that the use of guideline or gag orders was never intended nor enforced by this Court when the *Sheppard* decision was written. See *Christian Science Monitor*, February 26, 1973, page 3, wherein Justice Clark predicted that this Court would soon issue guidelines on gag orders which would seriously restrict their use. In numerous cases where the judiciary has issued gag orders against the publications, the judicial actions on the part of the bench have been reversed by the higher courts. *Sun Company of San Bernadino California v. Superior Court*,

29 C.A. 3d 815 (1973), hrg. denied by the California Supreme Court on March 23, 1973; *U.S. v. Dickinson*, 465 F.2d 496 (Fifth Circuit, 1972) (reversed on the ground the order was constitutionally infirm, but remanded for determination by the District Court if punishment for the wilful disregard of the court order might still be justified); *Wood v. Goodson*, 485 S.W.2d 213 (Ark., 1972).

The Petitioner herein urges that this Court utilize the records consolidated below as the instrument to define and clarify what constitutional rights the accused has and the route that both he and the bench must travel in obtaining a trial free from prejudicial publicity. We have here a typical case of a community saturated by the news media. The factual situation here involves extensive, but localized, prejudicial pre-trial publicity. We have a factual situation which does not involve national nor regional news and a ruling that change of venue is requisite for such a situation would have brought justice to this Petitioner. The change of venue remedy needs to be made more readily available in southern states such as Alabama which historically seldom allow this to an accused.

In the records below the publicity of the local newspaper, radio and television media publications and the effect of the same were stressed. The record was complete with news addressed to the local Mobile community from Birmingham newspapers to show that a modest circulation of an out-of-town newspaper added to the cumulative effect of the publicity disseminated to the metropolitan Mobile area. The State has previously argued to this Court that these few clippings from the Birmingham newspapers reflected that the publicity extended heavily throughout Alabama and such is not the case nor will the records bear out such a view as there is simply no evidence within the records to substantiate such a finding. A change of venue in the cases below to an adjoining county would have relieved this accused from the saturation of publicity within the local county.

The jury selection, as pointed out by Justice Jones' dissent, would have not reflected the patent prejudice this accused was faced with from his peers if the change of venue had occurred.

We respectfully urge this court, in light of the matters cited above, that the injustice of these decisions requires a review of the record through jury selection in order for the full impact of the prejudice to be fully appreciated by the court. The law stands today with an enigma before it. The accused and his attorneys look to *Sheppard* for the rules and the offer of whatever protection is available by *Sheppard* to an accused. The accused is simply not receiving the protection of *Sheppard* because of the antagonism in our country presented by the First Amendment armour which surrounds the public media.

The Petitioner herein, although girded by *Sheppard*, was powerless to obtain the lower courts utilization of these rules in his behalf and based on the cases as we read them, other petitioners are powerless to have the protection of *Sheppard* because of the conflict between the court system as such and the freedom of the press arguments.

We do not argue that there should not be respect between the courts and the press; however, surely one is subservient to the other and surely freedom of the press should not be superior to the right of an accused to a trial free of prejudice.

In the cases as consolidated below, there is some dicta by the Court of Criminal Appeals that a continuance was granted. This Petitioner would show this was not sufficient. Continuances, however, of and in themselves are not the answer. The Petitioner wanted a speedy trial. Long drawn out continuances in a case such as we have here involving witnesses who are school teachers who frequently change employment merely allow for the scattering of evidence which is so vital to an accused. We query as to the second enigma under the rules as we know them today of how an accused can obtain a speedy trial which is his

right if all that he receives at the hands of the bench is a long continuance so that he might be served by this right to a trial free of prejudice because of prejudicial pre-trial publicity. The answer to this Petition is obvious. One can avoid a conflict between right to speedy trial and right to a forum free of prejudice, by this court mandating that a change of venue is required. We do not argue that a forum close by will be completely sterile of prejudice, but surely one would more apt obtain the rights under the Constitution as prescribed by our forefathers close by rather than in the very heart of the controversial matter which is to be debated.

CONCLUSION

For the foregoing reasons as well as those grounds set forth in the Petition for Writ of Certiorari, this Petitioner prays that this Court grant a rehearing of its order of denial of certiorari, vacate the order, grant the Petition and review the judgment and opinion of the Supreme Court of Alabama and the Alabama Court of Criminal Appeals setting aside the judgments affirming the Circuit Court of Mobile County and reversing the judgments of conviction.

Respectfully submitted

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Counsel for Petitioner

Certificate of Counsel

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for purposes of delay and that same is restricted to the grounds specified in Rule 58(2) of this Court.

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Certificate of Service

I hereby certify that on this the 5th day of February, A.D., 1975, three true copies of the above and foregoing Petition for Rehearing were mailed United States Postage prepaid, to Honorable William J. Baxley, Attorney General, State of Alabama, 250 Administrative Building, Montgomery, Alabama 36104, Counsel for Respondent. I further certify that all parties required to be served have been served.

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